Supreme Court, U.S.
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No. 95-1219

IN THE

Supreme Court of the United States

October Term, 1995

GEORGE NEWMAN,

Petitioner,

vs.

CONSOLIDATION COAL COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A SEAMAN ASSERTING A PERSONAL INJURY CLAIM FOR JONES ACT NEGLIGENCE AND UNSEAWORTHINESS IN SHIPOWNER'S SINGLE CLAIMANT NON-CONCURSUS LIMITATION OF LIABILITY ACTION HAS A RIGHT TO THE JURY TRIAL HE DEMANDED AND AS THE JONES ACT EXPRESSLY PROVIDES?

a. WHETHER A SEAMAN'S CUSTOMARY WAIVER OF RES JUDICATA WHICH WAS INTENDED TO AND DID OBTAIN A JURY TRIAL IN STATE COURT WAIVES HIS RIGHT TO A JURY TRIAL IN THE SUBSEQUENT LIMITATION ACTION WHEN THAT WRITTEN WAIVER NEITHER EXPRESSLY NOR IMPLIEDLY GIVES UP A JURY TRIAL IN THE LATER PROCEEDING?

II. WHETHER UNDER THE SEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, A FEDERAL DISTRICT COURT MAY REEXAMINE A JURY'S FACTUAL FINDINGS OF JONES ACT NEGLIGENCE AND UNSEAWORTHINESS?

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PETITION FOR WRIT OF CERTIORARI

Petitioner George Newman respectfully petitions this Honorable Court for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit to review that court's denial of Newman's Petition for a Writ of Mandamus to and dismissal of his appeal from the August 4, 1995 Order of the United States District Court for the Western District of Pennsylvania.

Petitioner, a seaman ward of the court, was critically injured by his employer's negligence and the unseaworthiness of its vessels on April 27, 1989. A Pennsylvania jury found in his favor on November 25, 1991 in Answers to Special Interrogatories. The employer appealed, and Newman cross appealed, those findings through the entire state court appellate system.

The United States District Court for the Western District of Pennsylvania enjoined Newman first from proceeding with the prior state lawsuit and later from collecting his judgment in an ex-parte injunction of which Newman and his attorney had no prior notice or opportunity to be heard. The Court of Appeals denied without opinion Newman's earlier appeal of the modification and continuation of that injunction.

More than six years after Mr. Newman was hurt and nearly four years after the jury verdict in his favor, on August 4, 1995, the District Judge has ordered a complete new trial requiring Mr. Newman to again prove his employer's liability and his damages in a *nonjury* trial. Mr. Newman seeks Certiorari to review those rulings which he contends are unjust, unlawful, and unreasonable.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Third Circuit Dated November 29, 1995 is reprinted in the Appendix at Pages A1-A2. The Denial of Petition for Rehearing of the United States Court of Appeals for the Third Circuit Dated December 27, 1995 is reprinted in the Appendix at Page A3.

The District Court's unreported Order of August 4, 1995 is reprinted in the Appendix at Pages A4-A7. The parts of the Order Mr. Newman attacks are the decision to deny Mr. Newman a jury trial and proceed "without a jury." (Appendix at Page A5) and the decision to reexamine the facts found by the state court jury: Claimant's Motion to Adopt the Findings of the Jury as the Findings of the Court (document No. 43) . . . "is DENIED." (Appendix at Page A7).

The District Judge stated in the transcript of July 31, 1995:

> THE COURT: I take it you still contest liability. Is that it?
>
> MR. MILLER (Consol's Attorney): That's correct, Your Honor, and that has been stipulated to.

(Appendix at Page A54).

> THE COURT: Okay, So he (Newman) would still call the same, I take it, medical experts that he has called in State Court to prove his case here.

(Appendix at Page A56).

JURISDICTION

This case involves the denial of a seaman's right to trial by jury. George Newman, Petitioner, seeks a Writ of Certiorari in this Limitation of Liability Act case, 46 U.S.C. §183, to review the November 29, 1995 Order of the United States Court of Appeals for the Third Circuit, Rehearing denied December 27, 1995, dismissing Mr. Newman's appeal for lack of jurisdiction "at this time" and denying his Petition for Mandamus. 28 U.S.C. §1254(1) is the Statute granting this Court jurisdiction of this case:

> **28 §1254. Courts of appeals; certiorari; certified questions**
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> * * *
>
> (As amended June 27, 1988, Pub.L. 100-352, §2(a), (b), 102 Stat. 662.)

The subject of Mr. Newman's appeal and Petition for Mandamus, dismissed and denied respectively by the Court of Appeals, was an August 4, 1995 Order of the United States District Court for the Western District of Pennsylvania, Bloch, J., which ordered a nonjury trial of Petitioner's Jones Act negligence and unseaworthiness claims despite his timely and proper demand for a jury, and a reexamination of the factual findings of the prior state court jury in the seaman's case Mr. Newman brought against Consol in the Court of Common Pleas of Allegheny County, Pennsylvania. Mr. Newman's

objection thereto was set forth in his Motion to Adopt the Facts Found by that jury in the Limitation of Liability case.

The district court had concurrent jurisdiction with the state court of the unseaworthiness and Jones Act claim by statute. That legislation incorporates the Federal Employers' Liability Act, 45 U.S.C. §51 et seq.:

The Jones Act
46 U.S.C. §688

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply;

§56 of the FELA confers concurrent jurisdiction on both state and federal courts:

45 U.S.C. §56. Actions; limitations; concurrent jurisdiction of courts

* * *

> The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. (Apr. 22, 1908, c. 149, §6, 35 Stat. 66; Apr. 5, 1910, c. 143, §1, 36 Stat. 291; Mar. 3, 1911, c. 231, §291, 36 Stat. 1167; Aug. 11, 1939, c. 685, §2, 53 Stat. 1404; June 25, 1948, c. 646, §18, 62 Stat. 989.)

Defendants cannot remove Jones Act and FELA cases from state to federal court, 28 U.S.C. §1445(a):

§1445. Nonremovable actions

> (a) A civil action in any State court against a railroad or its receivers or trustees, arising under sections 51-60 of Title 45, may not be removed to any district court of the United States.

The district court also had jurisdiction of the Limitation of Liability action under 28 U.S.C. §1333(1):

> **§1333. Admiralty, maritime and prize cases**
>
> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases and all other remedies to which they are otherwise entitled.*
>
> * * *

(Emphasis added) Contrary to the district court's legal conclusion (Appendix at page A6), the Saving to Suitors clause accented above is a statutory exception to the exclusive jurisdiction of the federal courts.

The All Writs Act, 28 U.S.C. §1651, invested the United States Court of Appeals for the Third Circuit with jurisdiction over his Petition for Writ of Mandamus to protect Mr. Newman's constitutional right to a jury trial:

> §1651. Writs
>
> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. (As amended May 24, 1949, c. 139, §90, 63 Stat. 102.)

The right to mandamus to determine questions of entitlement to jury trial has been settled for more than a century. As Justice Holmes wrote in *Matter of Simons*, 247 U.S. 231, 239-240 (1918):

> If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt with now, before the plaintiff is put to the difficulties and the Courts to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake. It does not matter very much in what form an extraordinary remedy is afforded in this case. But, as the order may be regarded as having repudiated jurisdiction of the first count, mandamus may be adopted to require the district court to proceed and to give the plaintiff her right to a trial at common law.

(Citation omitted) As said in *Beacon Theatres Inc. v. Westover,* 359 U.S. 500, 511 (1959):

> . . . the right to grant mandamus to require jury trial where it has been improperly denied is settled.
>
> * * *
>
> In the Federal courts this [jury] right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action, or during its pendency.

Id. at 359 U.S. 510 *quoting Scott v. Neely,* 140 U.S. 106, 109-110 (1891). The *Beacon* court reversed the Ninth Circuit denial of mandamus. The Third Circuit's denial of mandamus to a *defendant* asserting a right to trial by jury of his legal defenses to plaintiff's complaint alleging only equitable claims was reversed in *Dairy Queen Inc. v. Wood,* 369 U.S. 469 (1962). That opinion restated "the responsibility of the Courts of Appeals to grant mandamus where necessary to protect the constitutional right to trial by jury." *Id.* at 472. Although not a mandamus case, denial of a jury trial by the lower courts to a defendant was reversed in *Tull v. U.S.,* 481 U.S. 412 (1987).

Mandamus will issue to reverse a district court's order that a federal plaintiff's Rule 9(h) Fed.R.Civ.Proc. statement identifying its claim as one in admiralty "extinguished" the defendant's right to trial by jury on its legal counterclaim. *Wilmington Trust v. U.S. Dist. Court for D. Hawaii*, 934 F.2d 1026, 1028 (9th Cir. 1991).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Constitution of the United States of America

"AMENDMENT VII

In suits at common law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

28 §1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * *

(As amended June 27, 1988, Pub.L. 100-352, §2(a), (b), 102 Stat. 662.)

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28 U.S.C.

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(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. (As amended May 24, 1949, c. 139, §90, 63 Stat. 102.)

The Jones Act
46 U.S.C. §688

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply;

§56. Actions; limitations; concurrent jurisdiction of courts

45 U.S.C.

* * *

The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. (Apr. 22, 1908, c. 149, §6, 35 Stat. 66; Apr. 5, 1910, c. 143, §1, 36 Stat. 291; Mar. 3, 1911, c. 231, §291, 36 Stat. 1167; Aug. 11, 1939, c. 685, §2, 53 Stat. 1404; June 25, 1948, c. 646, §18, 62 Stat. 989.)

§1445. Nonremovable actions

28 U.S.C.

(a) A civil action in any State court against a railroad or its receivers or trustees, arising under sections 51-60 of Title 45, may not be removed to any district court of the United States.

§1333. Admiralty, maritime and prize cases

28 U.S.C.

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

* * *

46 U.S.C. §183(a)

The liability of the owner of any vessel, whether American or foreign, for any embezzlement loss or destruction by any person of any property, goods or merchandise shipped or put on board of such vessel, or for any act, matter or thing, loss damage or forfeiture, done, occasioned or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

STATEMENT OF THE CASE

George Newman, a seaman, was severely injured on April 27, 1989 when a rope broke during the course of his employment as a deckhand with Consolidation Coal Company (Consol), causing him to fall into the empty hold of a coal barge. He filed suit to recover money damages against Consol on January 17, 1990 in the Court of Common Pleas of Allegheny County, Pennsylvania at GD 90-00980. (Claimant's Motion to Dissolve Injunction and to Stay, Appendix A46-47). That lawsuit asserted claims for unseaworthiness and negligence under the Jones Act. Alternatively he sought to recover for negligence under §5(b) of the Longshore and Harbor Worker's Compensation Act, 33 U.S.C. §905(b) (*Id.*) (Appendix A46).

On July 20, 1990, almost six months after process was served on it, Consol filed suit to Limit its liability in the United States District Court for the Western District of Pennsylvania at C.A. 90-1206. (Docket Entries, Appendix A12). The district court immediately issued an ex-parte injunction forbidding Mr. Newman to prosecute his state court suit. (Docket Entry No. 5, Appendix A14). Mr. Newman's first appearance in the limitation case demanded a jury trial (Appearance, Appendix A45), and the clerk so marked the docket. (Docket Entries, Appendix A12). On January 18, 1991 Mr. Newman moved to vacate or dissolve the injunction and stay. Mr. Newman specifically recited his reliance on the Jones Act, inter alia. (Paragraph one, Claimant's Motion to Dissolve Injunction and Stay, Appendix A46). Paragraph ten of that motion (Appendix, A48) expressly asserted Newman's right to jury trial:

> 10. Mr. and Mrs. Newman, on the other hand, will be severely prejudiced if the Injunction remains in effect because they will be deprived of their right

> to prosecute this Case in State Court granted to them by Congress in the Savings to Suitors clause, 28 U.S.C.A. §1333 (Suitors in Admiralty are entitled to a common law remedy where the common law is competent to give it). Mr. and Mrs. Newman will further be severely prejudiced if their Motion is not granted because they will be deprived of their right to a jury trial granted to them by the Constitution of the United States of America.

The district court required the following stipulation (Appendix A8-9) which was filed (Appendix A50):

> Claimants, George Newman and Suzanne M. Newman, his wife, and their Attorney, Paul L. Hammer, Esquire, hereby stipulate and agree to the following:
>
> 1. The Claimants waive any claim of *res judicata* based upon any judgment obtained in the State Court proceeding.
>
> 2. Consolidation Coal Company shall have the right to litigate all issues relating to its claims of limitation and exoneration of liability in the present proceeding at the above caption.
>
> 3. The issue of valuation of the limitation fund shall remain an issue to be resolved by the United States District Court for the Western District of Pennsylvania in the case captioned above.

The District judge then modified the injunction to permit Newman to prosecute his action to verdict in state court(Appendix A10-11).

The parties returned to the state court where on November 25, 1991 a jury answered special interrogatories (Appendix A31-32), finding Consol negligent under the Jones Act, its vessels unseaworthy and both were legal causes of Mr. Newman's injuries. The jury further found Newman was negligent to the extent of 11.83% and set his damages at $1,327,000.00

(*Id.*) Consol, not Newman, requested the state trial judge to instruct the jury that it could not be negligent unless Consol knew or should have known of the condition (Consol's Point For Charge No. 10, Appendix A33, 34-35). The state trial judge gave that requested charge (Appendix A35), and the jury found as a fact that Consol was negligent and, therefore, knew or should have known. Consol's main defense in the state court case was that it was not negligent because it was and had been company policy for many years that only the deckhand would inspect its rope and lines (Appendix A37, 40-42). Newman's Motion for Summary Judgment filed January 22, 1991 (Docket Entry No. 25, Appendix A16) remains undecided.

The facts found by the jury in answer to special interrogatories have survived post trial motions, appeal to the Superior Court of Pennsylvania, 652 A.2d 415 (1994) (table) rehearing denied, denial of allocatur by the Supreme Court of Pennsylvania, 659 A.2d 560 (1994) (table), and Mr. Newman's attack on the finding of his negligence in his Petition for Writ of Certiorari to this Honorable Court at 95-240, denied at _____ U.S. _____, 116 S.Ct. 331 (1995).

The parties returned to the district court to litigate the limitation case. Mr. Newman filed a Motion to Adopt the Findings of the State Court jury as the starting facts in the limitation case (Appendix A26-44). Mr. Newman's counsel made clear at a status conference on July 31, 1995 (Appendix A51) that he was not invoking *res judicata* but seeking only to preserve Mr. Newman's rights to jury trial. (Appendix A51-54):

> MR. HAMMER: No, Your Honor. We stipulated that we would not invoke res judicata. That's not why we're here. We're here asking the Court by this motion to do only one thing, and that

> is to take the findings of the State Court jury and then the Court will proceed—as I envision it, this Court will then proceed to go ahead and consider and litigate the question of Consol's rights in the petition that has been filed in the case.
>
> * * *
>
> MR. HAMMER: Well, I think, Your Honor, to protect Mr. Newman's rights under the Seventh Amendment, that to decide this case, Mr. Newman is entitled to have those jury findings given weight by this Court.
>
> THE COURT: Why would I give those jury findings weight as to whether they're entitled to a limitation of liability?
>
> MR. HAMMER: Because if you recall, in a limitation of liability case, it's a split procedure. First Mr. Newman has to establish the liability of the defendant—of Consol, rather, to him. He has proven in State Court that Consol was negligent, its vessels were unseaworthy, that those conditions were the legal cause of his injuries. His injuries are liquidated there in an amount that exceeds the limitation fund. He has proven all of those things. A jury has found them. So once that happens, it then comes to Consol, who bears the burden of proof on this, to prove that they are without privity or knowledge of the conditions that injured Mr. Newman. So my thought—

The court requires Newman to again prove liability (Appendix A55) and damages (Appendix A56). The written order dated August 4, 1995 decreed retrial of all facts and denied Mr. Newman's Motion to Adopt the Jury's facts, finding and ordered a complete new trial *nonjury* (Appendix A4-7).

The Court of Appeals denied Mr. Newman's Petition for Mandamus (Appendix A1-2), claiming an abridgement of Mr. Newman's right to jury trial and objecting to any reexamination of the facts found by the state court jury for that reason (Appendix A24-25). The court also dismissed Mr. Newman's companion appeal from the order of August 4, 1995 for lack of jurisdiction at that time. Rehearing was denied December 27, 1995 (Appendix A3).

Mr. Newman's earlier appeal to the Third Circuit of an order modifying in part and continuing the District Court's injunction against execution of or enforcement of any state court judgment was denied by the Third Circuit without opinion in an order reported at 5 F.3d 1488 (1993) (table).

Consol argued to the district court there was no jurisdiction in admiralty that would entitle Mr. Newman to a jury trial and that Mr. Newman's stipulation waived the right to a jury trial. That court ruled that Mr. Newman had no right to a jury trial because the case was exclusively within the court's admiralty jurisdiction and Mr. Newman had waived any claim to jury trial by his stipulation. In the Mandamus action in the Court of Appeals Consol argued, citing several bankruptcy cases, and the court ruled Mr. Newman had not shown a clear and indisputable right to the writ (Appendix A2).

The case is now before the Supreme Court of the United States on Mr. Newman's Petition for Certiorari to review the rulings of the lower courts. Mr. Newman contends he had a right to a jury trial, the stipulation did not waive that right because it was designed to and did obtain a jury trial, the Seventh Amendment forbids a reexamination of the facts found by the state court jury, and he was entitled to a Writ of Mandamus to protect his right to trial by jury.

REASONS FOR GRANTING THE WRIT

I. Mr. Newman Was Entitled To A Jury Trial On His Jones Act And Unseaworthiness Claims. The Rulings Below Would Unlawfully Deprive Him Of Those Rights And Conflict With The Seventh Amendment, The Jones Act And Decisions Of This Court.

This case is an archetypical jury case. It involves personal injury claims for money damages based on negligence and unseaworthiness. Congress by express language in the Jones Act gave seamen the right to "maintain an action for damages at law, with the right of trial by jury." It has been reversible error for more than thirty years for a district court considering admiralty and Jones Act remedies combined in the same case, as here, to deny the seaman a jury trial. *Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963). The court said:

> Only one trier of fact should be used for the trial of what is essentially one lawsuit to settle one claim split conceptually into separate parts because of historical developments. And since Congress in the Jones Act has declared that the negligence part of the claim shall be tried by a jury, we would not be free, even if we wished, to require submission of all the claims to the judge alone.

374 U.S. 21. The district court ordered a *nonjury* trial of all claims on August 4, 1995. Mr. Newman's Jones Act claim was joined with the unseaworthiness action in the same case and he was entitled to a trial by jury on all claims so joined. *Fitzgerald*. Mr. Newman expressly claimed his right to jury trial under the Jones Act in this case and the district court had jurisdiction of the Jones Act claim through §56 of the FELA[1] which Congress

[1] The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

incorporated by reference in the Jones Act. Consol has on the other hand no statutory or constitutional right to a nonjury trial in its admiralty case. Returning again to the language of *Fitzgerald* the court wrote "Nor does any statute of Congress or Rule of Procedure, Civil or Admiralty, forbid jury trials in maritime cases." 374 U.S. 20.

The district court observed this is a single claimant case (Appendix A5). In single claimant cases the limitation device of a concursus in which the limitation judge adjudicates the litigation of several claimants is not used. *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 150 (1957):

> Among these sections dealing with the mechanics of effecting such limitation of liability is §184 covering those incidents where "the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of [the claimants]." In that event, the section continues, "they shall receive compensation from the owner of the vessel in proportion to their respective losses; and *for that purpose*" the owners "may take the appropriate proceedings in any court . . ."

See also Gilmore & Black, *The Law of Admiralty* (Second Edition 1975) at page 869:

> The case of the single claim which exceeds the limitation fund presents the opposite situation. There is no need for a concourse, but there is need for limitation. In the single claim case, as in the converse, the case law allowed plaintiff to have his common law action. However, since here there is a need for limitation and since under Supreme Court theory questions of limitations are properly cognizable only in the admiralty court, plaintiff is allowed to proceed outside the admiralty only on condition that he acknowledge defendant's right to

> litigate the question of limitation (as distinguished from his liability on the merits) in the admiralty court.

A plaintiff cannot defeat defendant's right to jury trial on his legal counterclaim by proceeding only in admiralty, as Consol has attempted here. *Wilmington Trust v. U.S. District Court for D. Hawaii, supra,* citing this court's decisions in *Beacon Theatres v. Westover, supra* and *Dairy Queen v. Wood, supra.* In *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines,* 369 U.S. 355 (1962) this court decided the Seventh Amendment preserves the jury trial right of a litigant who has a jurisdictional basis independent of admiralty as does Newman. In *Ellerman* there was diversity. Newman has the concurrent jurisdiction of the Jones Act. See also Billy Coe Dyer, *The Jury on the Quarterdeck: The Effect of Pleading Admiralty Jurisdiction When a Proceeding Turns Hybrid,* 63 Tex. L. Rev. 533, 536 (1984):

> The seventh amendment directive that juries adjudicate most questions of fact is violated when courts allow admiralty procedures to defeat a party's right to a jury trial.

Consol and the trial court have cited the companion cases of *Langnes v. Green,* 282 U.S. 531 (1931) and *Ex parte Green,* 286 U.S. 437 (1932) in an attempt to justify the reexamination of the jury facts and, alternatively, the denial of Newman's demand for a jury in such a putative retrial. That reliance is misplaced. Apart from the obvious distinction that *Langnes/Green* did not even discuss the jury trial issue, *Langnes/Green* held that a *claimant* could not prejudice a shipowner's right to litigate (as opposed to retry the facts found by the jury) the limitation question in federal court. There is no suggestion in *Langnes/Green* that a shipowner is entitled to itself submit a limitation fact issue to the jury and

then subsequently have that jury finding reexamined based upon a claim of self-inflicted prejudice. Another critical distinction between *Langnes/Green* and the case at bar is the fact that those cases were decided more than three decades before the 1966 merger of law and equity in the federal courts. *Langnes/Green* also long predated the judicial recognition of the preeminence of jury verdicts through application of the Seventh Amendment. Significantly, those cases were decided at a time when the circuit courts of appeal heard admiralty appeals *de novo* and the Supreme Court discussed that procedure at length. See *Langnes* at 282 U.S. 536. Subsequently, the jurisdiction of the circuit courts became exclusively appellate. To the extent *Langnes/Green* are relevant, they should be reexamined in the light of modern practice and Seventh Amendment jurisprudence and overruled. No case has yet been cited upholding an argument that a shipowner seeking limitation is unlawfully prejudiced by its own conduct.

The emergence of the preeminent right to trial by jury is apparent in this court's later decisions: *Meeker v. Ambassador Oil Corp.*, 375 U.S. 160 (1963) (Lower court's denial of jury trial in action to quiet title summarily reversed citing *Beacon Theatres* and *Dairy Queen*); *Ross v. Bernhard*, 396 U.S. 531, 539 (1970) (Seventh Amendment right to jury trial of legal claims "not forfeited merely because the stockholder's right to sue must first be adjudicated as an equitable issue triable to the court. *Beacon* and *Dairy Queen* require no less"); *Tull v. U.S.*, *supra* (Defendant has Seventh Amendment right to jury trial on legal claim in nonjury suit); *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990) (Seventh Amendment forbids use of equitable findings to bar jury trial on legal claim); *Local No. 391 v. Terry*, 494 U.S. 558 (1990) (plaintiff in action for breach of union's

duty of fair representation entitled by Seventh Amendment to jury trial even though cause did not exist at common law when the Constitution was adopted).

If the rulings are permitted to stand, Consol has deprived Newman of his Seventh Amendment rights to jury trial and to not have the jury facts reexamined, his statutory right to a jury trial under the Jones Act, his common law remedies under the Saving to Suitor's clause, 28 U.S.C. §1333(1) and to not have the case removed from state to federal court, 28 U.S.C. §1445(a). Under the paradoxical ruling of the lower court, a seaman may not have his constitutional and statutory rights unless he signs the stipulation; however, if he signs the stipulation, he is not entitled to his constitutional and statutory rights because he has waived them. The shipowner can so deprive the seaman by the single expedient of filing a petition for limitation and exoneration no matter how frivolous.

The manifest intent of Congress cannot be so easily frustrated by a shipowner's unilateral maneuvering. The Limitation Act is not to be transformed "from a protective instrument to an offensive weapon by which the shipowner could deprive suitors of their common-law rights . . ." *Lake Tankers v. Henn, supra,* at 354 U.S. 152.

A. Mr. Newman's Motion To Vacate Or Dissolve Injunction And To Stay (Appendix A46) Expressly Claimed His Seventh Amendment And Jones Act Right To Jury Trial Through The Saving To Suitors Clause of 28 U.S.C. §1333(1). The District Court's Order Of February 1, 1991 Permitted Newman's Claimed Rights And The Jury Returned Its Answers To Special Interrogatories After A Lengthy Trial. Those Findings Have Been Upheld On Appeal. The Stipulation Did Not Waive Any Of Petitioner's Jones Act, Seventh Amendment Or Savings To Suitors Rights.

Newman expresssly invoked the Jones Act, The Seventh Amendment and the Saving to Suitors Clause and claimed his right to trial by jury in paragraphs 1 and 10 of his Motion to Vacate or Dissolve Injunction (Appendix, A46, 48). The stipulation[2] required by the district court (Appendix A8-9) and furnished by Newman (Appendix A50) and the consequent order of February 1, 1991 (Appendix A10-11) do not mention or even refer directly or by implication to any waiver of Newman's right to trial by jury. That order does just the contrary; it grants petitioner's motion to protect his constitutional and statutory rights.

The strong presumption against waiver of the constitutional right to trial by jury is firmly embedded in the decisions of this court:

> "But, as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver."

Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937). See *Johnson v. Zerbst,* 304 U.S. 458 (1938) (criminal case): " 'courts indulge every reasonable presumption against

[2] The motion and stipulation are in writing so the appellate courts owe no deference to the interpretation of the district court.

waiver 'of fundamental constitutional rights and . . .' [do not] presume acquiescence in the loss' " of such rights. 304 U.S. 464 *quoting Aetna Ins. Co. v. Kennedy, supra.* The nonadmiralty case of *Butler v. Pollard,* 800 F.2d 223 (10th Cir. 1986) involved a claim for damages and for an injunction from the claimed trespass. The parties stipulated the trial judge would decide the injunction issue after the jury trial on damages. The jury found on the facts for the defendants but the trial judge issued the injunction ruling he was not bound by the facts found by the jury because defendants waived their right to jury trial by entering into the stipulation. The Court of Appeals reversed, writing:

> Nothing in this agreement even hints that the defendants agreed to allow determination of the equitable issues in a manner inconsistent with the jury's verdict.

(800 F.2d 225). Mr. Newman directly acknowledged Consol's right to litigate (and restated Newman's right to trial by jury Appendix A52-54) the limitation question in the July 31, 1995 status conference[3] (Appendix A51).

It is the depth of unreason to presume that Newman intended to squander his money, the time and effort expended on this case by Judge McFalls of the state court and his staff over nearly four years, the jurors who spent two weeks hearing and deciding the dispute, the

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[3] A serious question exists as to the good faith basis for the claim of limitation. Consol has insisted, and the uncontradicted evidence shows, management did not inspect the ropes as a matter of corporate policy (Consol's Brief, Appendix A37, 40-42). In that case the corporate shipowner cannot limit its liability. *Kellogg & Sons v. Hicks,* 285 U.S. 502 (1932). In addition Consol, who was not bound by the injunction of July 20, 1990 and amended February 1, 1991, itself submitted the question of its knowledge and privity to the jury in the Jones Act case (Appendix A33, 34-35). The jury's finding of negligence resolved that fact against Consol.

three judges of the Panel of the Superior Court, the fifteen commissioned and one senior judge of Superior Court who considered the Petitions for Reargument, the seven justices of the Supreme Court of Pennsylvania who decided the Petitions for Allowance of Appeal and the Justices of this court who considered and ruled on the earlier Petition for Certiorari. It is equally unreasonable to presume Newman meant to waste the considerable tax money expended and to be spent both by the citizens of Pennsylvania and of the United States, just to give Consol a second bite of the factual apple, when neither it nor the district court have given any reason to indulge in such a wasteful and duplicative procedure, other than the invalid assertion of waiver. Even if there were waiver, there has been no reason good or otherwise stated to retry the entire case. The court's order cited no authority for ignoring the facts found by the jury and Consol has cited no single claimant nonconcursus case where a jury's findings were held irrelevant.

Applying the presumption against waiver of jury trial and other constitutional rights, the terms of the stipulation cannot be a waiver of Mr. Newman's Seventh Amendment rights.

The lower courts erred in ruling to the contrary.

II. The Seventh Amendment Gives Mr. Newman The Right To Not Have The Facts Found By The Jury Reexamined, And The Ruling Of The Lower Court To Do So Conflicts With This Court's Decision In *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines*, 369 U.S. 355 (1962).

The last clause of the Seventh Amendment to the Constitution of the United States (Appendix A61) states:

> "... no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

The answers of the jury to the special interrogatories found inter alia the following facts:

(1) Consol was negligent under the Jones Act
(2) Consol's vessels and line were unseaworthy
(3) Newman was 11.83% negligent
(4) Newman's damages were $1,327,000.00

(Appendix A31-32) Sections I and I A of this petition above demonstrate Newman has Seventh Amendment and Jones Act rights to jury trial which he did not waive.

This court held in the controlling maritime case of *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines* that the Seventh Amendment forbids a reexamination of a jury's answers to special interrogatories in a case involving negligence and unseaworthiness. Like here, the jury in *Ellerman* answered special interrogatories finding negligence, unseaworthiness and setting damages (369 U.S. 357). The jury also found the stevedore did not breach its contractual duty to the shipowner. (*Id.*) The Court of Appeals reexamined and rejected the last jury fact finding. This Court reversed in the following clear language:

> We might agree with the Court of Appeals had the questions of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States than according to the rules of the common law."
>
> The requirements of the Seventh Amendment were brought into play in this case, even though a stevedoring contract is a maritime contract.

(369 U.S. 358-359) (Footnote omitted).

The fact that the jury sat in state court is irrelevant because the federal court is bound by its findings since the Seventh Amendment applies to cases coming from the state courts into the federal court system. *New York Times v. Sullivan*, 376 U.S. 254, 285 n. 26 (1964). Because of the so called "reverse-*Erie* doctrine,"[4] state courts hearing federal cases must apply federal substantive law, which in Mr. Newman's case was maritime law. The Third Circuit has observed, "[t]he Pennsylvania courts have demonstrated no reluctance in meeting their obligation to follow federal law . . ." *U.S. Steel Corp. Plan for Emp. Ins. v. Musisko*, 885 F.2d 1170, 1178 n. 4 (3rd Cir. 1989).

In *Gorman v. Cerasia*, 2 F.3d 519 (3rd Cir. 1993), the Third Circuit indicated its understanding that the factual findings of the state court jury would apply in the ensuing limitation of liability case in federal court. Chief Judge Sloviter wrote:

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[4] *Erie R. Co. v. Tompkins*, 304 U.S. 62 (1938) requires the application of state substantive law in federal trials heard under the diversity jurisdiction because of the constitutional guarantee of equal protection of the law. Different treatment of similarly situated parties in federal courts from the treatment accorded in state court was held to be a denial of that guarantee.

> Of course, if the *jury in the state proceeding* concludes that [shipowner] acted negligently, it is likely that there will be little, if any, basis upon which he may claim that the accident occurred without his privity or knowledge.

2 F.3d at 529 (emphasis supplied). The stipulation in *Gorman* was much broader than the stipulation Newman was ordered to furnish.

The Court in *Luhr Bros., Inc. v. Gagnard,* 765 F.Supp. 1264 (W.D. La. 1991), also noted that although an admiralty limitation action would proceed after a state court renders judgment for the plaintiff for an amount greater than the limitation fund,

> the admiralty action would proceed in the sense that the admiralty court would be obligated to approve the claim against the shipowner. This would be a mere formality; it would not be necessary to determine the main issues of limitation in this situation.

765 F.2d at 1268 n. 3.

In *Caputo v. U.S. Lines Company,* 311 F.2d 413, 416 (2nd Cir. 1963), the Court held that the verdict by the jury that a longshoreman's injury was caused by a shipowner's failure to properly stow the cargo and furnish dunnage, bound the court which tried the shipowner's third party claim against the stevedore for indemnity. After taking additional expert testimony in opposition to the shipowner's claim for indemnity, the district court found that the accident was due to a latent defect in a packing case. *Id.* The Circuit reversed ruling that "[i]nconsistent determinations based upon the same evidence at the same trial are logically impossible. The court must follow the verdict of the jury." *Id.*

Distinguished judges hearing limitation of liability cases have discussed the difficult constitutional issues Newman has raised that are implicated in the exact procedure Judge Bloch has ordered and have rejected that approach. Leval, J. *Red Star Towing & Transp. Co. v. "Ming Giant"*, 552 F.Supp. 367, 372, 374 (S.D. N.Y. 1982) wrote:

> Since such a trial has already been conducted by the parties before a jury, it seems most appropriate, in service of the principles of *Dairy Queen* (if it is not required as a matter of law), to give effect to the jury trial that has been conducted.

Rubin, J., *Doughty v. Nebel Towing Co.*, 270 F.Supp. 957 (D.C. La. 1967) citing *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962) held:

> Therefore, in accordance with the decision in *Dairy Queen, Inc. v. Wood, supra*, it is ordered that plaintiff's motion for a jury trial of the issues raised by the defense of limitation set forth in the answer is granted, but to the following extent only: the issue pertaining to whether any act, matter or thing, loss, damage or forfeiture, was done or incurred for which the defendant is responsible and, if so, whether such act, matter or thing was done with the privity or knowledge of the defendant, being issues to be determined upon substantially the same evidence will be submitted to the jury. In all other respects the motion is denied, and the other issues relative to the limitation of liability claimed by the defendant will be tried by the Court alone, as an Admiralty Court, after the jury arrives at a verdict.

270 F.Supp. at 962 (footnote omitted). *See also* Sofaer, J., *Complaint of Berkley Curtis Bay Co.*, 569 F.Supp. 1491, 1495 (S.D. N.Y. 1983) (where the district court had admiralty jurisdiction over the limitation of or

exoneration of liability claim and jurisdiction under the Jones Act "...[t]he jury was the only proper factfinder").

"Because the district court properly submitted all claims to the jury, its decision rendered as a court in admiralty is superfluous, ..." *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 154 (4th Cir. 1995).

Consol relied on *Port of Pasco v. Pacific Inland Navigation Company*, 324 F.2d 593 (9th Cir. 1963). That case did not involve a jury verdict and the Seventh Amendment. The state court findings were made by a trial judge and *not* a jury: "the state action then proceeded to a trial before the court sitting without a jury." (324 F.2d at 595).

There is a practical legal solution to the perceived clash between the seaman's constitutional and statutory rights and admiralty tradition. It should be remembered that the shipowner does not have a right to limitation but instead to litigate its right to limitation in the admiralty court. Every day in courthouses across the country, parties litigate cases where the facts are established as they are here. Judges routinely decide litigation between parties on summary judgments, cases stated, amicable actions, etc. Having the litigation proceed on the facts found by the jury with the limitation judge applying the law to those facts meets the rights of all parties. On the other hand, following the course of the district court in this case does violence to fundamental rights enshrined in the Constitution.

CONCLUSION

The district court decision of August 4, 1995 violates Petitioner's Seventh Amendment and statutory rights and is required by no statute or other law. The procedure ordered will increase litigation, waste scarce judicial resources and public funds at a time when economy in government is essential, and result in unnecessary delay and complication. Adopting the facts already found by the jury will remedy those ills, afford Mr. Newman his rights and is not prohibited by any law. Mandamus should have issued to protect Mr. Newman's right to jury trial.

This Court should grant the Petition for Certiorari and reverse and remand to the Court of Appeals for the Third Circuit with instructions to issue the Writ of Mandamus to the United States District Court for the Western District of Pennsylvania ordering the grant of Mr. Newman's motion to adopt the factual findings of the jury.

Alternatively, if Mr. Newman must retry all his claims over his objections, the writ should issue to enforce his right to the jury trial which he demanded and to which the Jones Act and the Seventh Amendment entitle him.

Respectfully submitted,

LESTER E. ZITTRAIN
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Pittsburgh, Pennsylvania 15219
Telephone: (412) 261-0906

APPENDIX

Denial of Petition for Writ of Mandamus and Dismissal of Appeal by the United States Court of Appeals for the Third Circuit, Dated November 29, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

September 5, 1995
B-18

Nos. 95-3479/95-3491

IN RE: COMPLAINT OF CONSOLIDATION COAL COMPANY

GEORGE H. NEWMAN, *Petitioner-Appellant*
THE HONORABLE ALAN N. BLOCH,
Nominal Respondent
(Related to W.D. (Pittsburgh) of Pa.
Civil No. 90-cv-01206 (ANB))

Present: MANSMANN, SCIRICA and MCKEE,
Circuit Judges.

1. Petition for a Writ of Mandamus in 95-3479.

2. Clerk's submission for possible dismissal in 95-3491 due to a jurisdictional defect.

ANTHONY INFANT
Anthony Infant 597-3137
Deputy Clerk

O R D E R

The foregoing Petition for a Writ of Mandamus in 95-3479 is denied for failure of Petitioner to show a clear and indisputable right to the Writ.

It is further ordered that the appeal at 95-3491 is dismissed because the Court of Appeals does not have jurisdiction at this time.

The stay previously imposed is hereby dissolved.

By the Court,

CAROL LOS MANSMANN
Carol Los Mansmann
Circuit Judge

Dated:
NOV 29 1995
AWI/cc:
JRM PLH Hon. ANB

Denial of Petition for Rehearing of the United States Court of Appeals for the Third Circuit, Dated December 27, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 95-3479 and 95-3491

IN RE: COMPLAINT OF CONSOLIDATION
COAL COMPANY

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*,
BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA,
COWEN, NYGAARD, ALITO, ROTH, LEWIS, MCKEE
and SAROKIN, *Circuit Judges*.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

CAROL LOS MANSMANN
Carol Los Mansmann
Circuit Judge

DEC 27 1995

Order of August 4, 1995 of the United States District Court for the Western District of Pennsylvania

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 90-1206

COMPLAINT OF CONSOLIDATION COAL COMPANY, as owner of the Motor Vessel Elizabeth and as Charterer of Barge Number MC 1029, for exoneration from or limitation of liability.

O R D E R

AND NOW, this 4th day of August, 1995, upon consideration of Claimant's Motion to Adopt the Findings of the Jury as the Findings of the Court (document No. 43) filed in the above captioned matter on July 19, 1995, and upon further consideration of Complainant's Response thereto,

IT IS HEREBY ORDERED that said Motion is DENIED.

"The Limited Liability Act [the Act], 46 U.S.C. App. §§181-196, provides that the liability of a shipowner incurred as a result of a maritime accident 'without the privity or knowledge of such owner ... shall not ... exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.' " *Gorman v. Cerasia*, 2 F.3d 519, 523 (3d Cir. 1993) (*quoting* 46 U.S.C. App. §183(a)). Under the Act, a vessel owner may file a suit in a district court seeking a judgment

exonerating or limiting its liability to a claimant. *In re Midland Enterprises, Inc.*, 886 F.2d 812, 813 (6th Cir. 1989).

Federal courts have exclusive admiralty jurisdiction over suits brought pursuant to the Act, *Langnes v. Green*, 282 U.S. 531, 540 (1931); *In re Midland Enterprises, Inc.*, 886 F.2d at 813, and if a shipowner files a complaint seeking protection under the Act, the district court is authorized to stay all other legal proceedings against the owner. *Gorman*, 2 F.3d at 523. Thereafter, "the district court, sitting in admiralty *without* a *jury*, determines" whether exoneration or limitation of the shipowner's liability is appropriate. *Id.* at 524 (emphasis added).

Nevertheless, where a *single* claimant brings a separate action against a shipowner seeking damages in excess of the value of the owner's vessel, a district court must lift the stay and permit the other action to proceed, but *only* if "the claimant stipulates that the [district] court has exclusive jurisdiction to determine all issues concerning the owner's limitation of liability under the Act." *Id.* As the Court of Appeals for the Third Circuit has stated:

> Specifically, the claimant must waive any claim of *res judicata* relevant to the issue of limited liability based on any judgment obtained in the state court, and concede the shipowner's right to litigate *all issues* relating to limitation in the federal limitation proceeding. The necessity of these two stipulations has been accepted by federal courts for over half a century and now is beyond dispute.

Id. at 524-25 (emphasis added) (citations omitted).

In this case, the claimant—who as a single claimant had previously been permitted to proceed with a state court action—currently requests that this Court adopt

the findings of the state court jury as the findings of the Court in this limitation proceeding. The claimant raises four arguments in support of his motion. The claimant initially contends that the Seventh Amendment precludes a re-examination of the jury's findings because the claimant is entitled to a jury trial with respect to his Jones Act claim. The claimant next argues that this Court lacks jurisdiction to review the judgment of the state court because only the United States Supreme Court has authority to review judgments of state courts. The claimant continues that considerations of judicial economy preclude relitigation of the issues already decided in the state court proceeding. Finally, the claimant argues that the complainant waived its right to have this Court determine the limitation issues under the Act by litigating these issues before the state court.

The claimant's arguments are unpersuasive. First, it is well-settled that claimants do *not* have a right to a jury trial in limitation proceedings brought under the Act, *see Gorman,* 2 F.3d at 524; *In re Dammaers and Vanderheide and Scheepvaart Maats Christina B.V.,* 836 F.2d 750, 754 (2d Cir. 1988); thus, any argument that this Court is required by Seventh Amendment principles to adopt the state court jury's findings is without merit.

Second, it is also beyond dispute that this Court has jurisdiction to decide *all issues* related to limitation of a shipowner's liability under the Act; in fact, not only does this Court have *jurisdiction* over this matter, it has *exclusive jurisdiction* over limitation issues. *See, e.g.,* 28 U.S.C. §1333; *In re Midland Enterprises, Inc.,* 886 F.2d at 813-14. This Court is not sitting in review of the state court judgment, but it is deciding the limitation issues presented under the Act in the first instance.

Third, considerations of judicial economy do not prevent this Court from deciding the limitation issues presented. The claimant himself requested relief from the stay and was responsible for any delay in the instant litigation. While under existing admiralty law, the claimant clearly had the option to proceed first in state court, the claimant cannot now rely on considerations of judicial economy to prevent this Court from deciding the limitation issues that remain in this case.

Finally, this Court notes that before it could permit the claimant to proceed with its state court action, the claimant was required to stipulate that the complainant "shall have the right to litigate *all issues* relating to its claim of limitation and exoneration of liabilty" before this Court. (Stipulation at ¶2) (emphasis added). Claimant's attempt to have this Court adopt the state court jury's findings for purposes of the limitation proceeding is directly contrary to his own stipulation. In addition, in light of the stipulation, the claimant cannot argue that the complainant waived its right to litigate the limitation issues by proceeding in state court; the complainant undoubtedly relied on the claimaint's stipulation when it agreed to litigate in a different forum.

Therefore, because the claimant has provided the Court with no authority to support its position that the Court should adopt the findings of the state court jury in this limitation proceeding, the claimant's motion is denied.

ALAN N. BLOCH
Alan N. Bloch
United States District Judge

cc: James Miller, Esquire
400 Two PPG Place, Pittsburgh, PA 15222

Paul Hammer, Esquire
518 Frick Building, Pittsburgh, PA 15219

Order of January 28, 1991 of the United States District Court for the Western District of Pennsylvania

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 90-1206

COMPLAINT OF CONSOLIDATION COAL COMPANY, as Owner of the Motor Vessel Elizabeth and as Charterer of Barge Number MC 1029, for Exoneration from or Limitation of Liability.

O R D E R

AND NOW, this 28th day of January, 1991, upon consideration of Claimants' Motion to Vacate or Dissolve Injunction and to Stay filed in the above captioned matter on January 18, 1991, and upon further consideration of Complainant Consolidation Coal Company's response thereto,

IT IS HEREBY ORDERED that the stay imposed by this Court on July 20, 1990, prohibiting further prosecution of all actions against Consolidation Coal Company, the Motor Vessel Elizabeth, or Barge No. MC 1029 shall be lifted to allow further prosecution of the suit filed by George and Suzanne Newman in the Court of Common Pleas of Allegheny County, No. GD 90-00980, upon the filing with this Court of the following stipulations by claimants:

1. that claimants waive any claim of *res judicata* based upon any judgment obtained in the state court proceeding;

2. that Consolidation Coal Company shall have the right to litigate all issues relating to its claims of limitation and exoneration of liability in the present proceeding; and

3. that the issue of valuation of the limitation fund shall remain an issue to be resolved by this Court.

Complaint of Dammers & Vanderheide & Scheepvaart Maats Christina B.V., 836 F.2d 750, 758 (2d Cir. 1988); *Langnes v. Green*, 282 U.S. 531, 540-42 (1931). This Court finds that the stipulations submitted by claimants in their motion do not fully satisfy these requirements. The stay imposed by this Court on July 20, 1990, shall be continued in effect against the entry and consequent enforcement of any judgment obtained in the state court action. Claimants' request that this Court stay the present action is denied.

ALAN N. BLOCH
Alan N. Bloch
United States District Judge

cc: Thomas A. Smock, Esquire
Suite 400, Four Gateway Center,
Pittsburgh, PA 15222

Paul Hammer, Esquire
518 Frick Building, Pittsburgh, PA 15219

Order of February 1, 1991 of the United States District Court for the Western District of Pennsylvania

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 90-1206

COMPLAINT OF CONSOLIDATION COAL COMPANY, as Owner of the Motor Vessel Elizabeth and as Charterer of Barge Number MC 1029, for Exoneration From or Limitation of Liability.

O R D E R

AND NOW, this 1st day of February, 1991, upon consideration of the Stipulation of Claimants and their Counsel filed in the above captioned matter on February 1, 1991,

IT IS HEREBY ORDERED that the stay imposed by this Court on July 20, 1991, prohibiting further prosecution of all actions against Consolidation Coal Company, the Motor Vessel Elizabeth, or Barge Number MC 1029, is hereby LIFTED to allow further prosecution of the suit filed by Claimants, George and Suzanne Newman, in the Court of Common Pleas of Allegheny County at No. GD 90-00980. The stay imposed by this Court on July 20, 1990, is continued in effect against the entry and consequent enforcement of any judgment obtained in the state court action.

AND, it appearing to the Court that no further action is contemplated by this Court at this time,

IT IS HEREBY ORDERED that the Clerk of Court mark the above captioned case closed.

Nothing contained in this order shall be considered a dismissal or disposition of this matter and, should further proceedings in it become necessary or desirable, either party may initiate it in the same manner as if this order had not been entered.

ALAN N. BLOCH
Alan N. Bloch
United States District Judge

cc: Thomas A. Smock, Esquire
Suite 400, Four Gateway Center,
Pittsburgh, PA 15222

Paul Hammer, Esquire
518 Frick Building, Pittsburgh, PA 15219

JST.	FF.	DOCKET NO. YR.	NUMBER	OR	FILING DATE MO.	DAY	YR.	J	NATURE SUIT	DIV.		23	DEMAND IN THOUSANDS	JUDGE	MAG.	COUNTY	JURY DEM.	DOCKET YR.	NUMBER
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PLAINTIFFS

COMPLAINT OF CONSOLIDATION COAL COMPANY, as Owner of the MOTOR VESSEL ELIZABETH and as Charterer of BARGE NUMBER MC 1029, FOR EXONERATION FROM OR LIMITATION OF LIABILITY.

DEFENDANTS

CERTIFIED FROM THE RECORD

Date JAN 12 1996
JAMES A. DRACH
By TONYA WILSON

#8 Personal Injury 46 USC 183 et seq.

~~CASE CLOSED~~
Reopened 7-5-95

CAUSE
(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

Docket Entries.

A12

ATTORNEYS

Thomas A. Smock, Atty
Polito & Smock, P.C.
Suite 400, Four Gateway Center
Pgh, PA. 15222
392-3500

Paul L. Hammer, Atty
518 Frick Building
Pgh, PA. 15219
For George & Suzanne Newman

James R. Miller, Atty
400 PPG Place
Pgh, PA. 15222
For Consolidated Coal

☐ CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID			STATISTICAL CARDS	
	DATE	RECEIPT NUMBER	C.D. NUMBER	CARD	DATE MAILED
				JS-5	
				JS-6	

UNITED STATES DISTRICT COURT DOCKET

DC-111 (Rev. 8/8

U.S. District Court
Western District of Pennsylvania (Pittsburgh)

CIVIL DOCKET FOR CASE # 90-CV-1206

Filed: 07/05/95
Jury demand: Defendant
Nature of Suit: 340
Jurisdiction: Federal Question

CONSOLIDATION COAL v.
Assigned to: Judge Alan N. Bloch
Demand: $0,000
Lead Docket: None
Dkt# in other court: None

Cause: 46:183 Exoneration, Limitation of Liability

COMPLAINT OF CONSOLIDATION COAL COMPANY, as Owner of the Motor Vessel Elizabeth and as Charterer of Barge Number MC 1029, for Exoneration From or Limitation of Liability *plaintiff*	James R. Miller [COR LD NTC] Dickie, McCamey & Chilcote Two PPG Place Suite 400 Pittsburgh, PA 15222-5402 (412) 281-7272
GEORGE T. NEWMAN *Claimant*	Paul L. Hammer [COR LD NTC] 518 Frick Building Pittsburgh, PA 15219 (412) 261-0907
SUZANNE M. NEWMAN *Claimant*	Paul L. Hammer (See above) [COR LD NTC]

C./A. 90-1206 Complaint of Consolidation Coal Co, et al.

DATE	NR.	PROCEEDINGS
1990		
Jul 20	1	COMPLAINT for exoneration from or limitation of liability and summons issued.
Jul 20	2	NOTICE of complaint for exoneration from or limitation of liability by pltf.
Jul 20	3	STIPULATION for costs by pltf in the sum of $250.00 (Surety—Federal Insurance Co)
Jul 20	4	LIMITATION BOND by pltf (Surety—Federal Insurance Co in the sum of $120,000.00)
Jul 20	5	MOTION for approval of limitation bond and stipulation for costs and for an order directing issuance of the required notice and for issuance of an injunction by pltf & ORDER dated 7-20-90 that said limitation bond and stipulation for costs are granted as stated more fully in order EOD: 7-23-90 Bloch, J. cm: all parties of record.
Jul 25	6	AFFIDAVIT OF SERVICE of mailing the complaint to Atty Paul L. Hammer, George T. Newman, Suzanne Newman and McDonough Marine Service on 7-23-90.
Jul 30	7	APPEARANCE of counsel on behalf of defts George and Suzanne M. Newman by Atty Paul L. Hammer.
Aug 31	8	MOTION to Compel Answers to Interrogatories by Claimants George Newman And Suzanne M. Newman w/proposed order.
Sept. 5	9	NOTICE of filing proof of publication by Complainant Consolidation Coal Company.
Sept. 5	10	HEARING on motion to compel/status conference held before Bloch, J. on 9/5/90; memo filed; Ct Rep—P. Sherman. Discovery

DATE	NR.	PROCEEDINGS
		closes 1/7/91; pltf's pretrial statement is due 1/28/91; deft's pretrial statement is due 2/18/91; pretrial conference set for 3/8/91 at 9:30 A.M.
Sept 7	11	CLAIM by George Newman and Suzanne Newman.
Sept 14	12	ANSWER by defts George Newman and Suzanne Newman.
Oct 1	13	CLAIMANTS' MOTION to increase security w/prop order.
Oct 1	14	MOTION for DEFAULT JUDGMENT by claimant George Newman and Suzanne M. Newman w/prop order.
Oct 2	15	ORDER dated 10-2-90 that claimants' motion is denied to compel answers to interrogatories; that claimant Consolidation Coal Co file a response no later than 10-12-90. EOD: 10-2-90 Bloch, J. cm: all parties of record.
Oct 2	16	ORDER dated 10-2-90 that claimants' motion for default judgment is denied EOD: 10-2-90 Bloch,J. cm: all parties of record.
Oct 3	17	TRANSCRIPT OF PROCEEDINGS of motion to compel held before Bloch, J. on 9-5-90 filed by Official Ct. Reporter Patricia Sherman.
Oct. 12	18	RESPONSE to claimants' motion to increase security by complainant Consolidation Coal Company.
Oct 15	19	NOTICE of Information to Claimants by Claimant Consolidation Coal Co.
1990 Oct. 15	20	OBJECTIONS to Consol's response to claimants' motion to increase security by claimants.

DATE	NR.	PROCEEDINGS
Oct. 16	21	LETTER to counsel of record that a hearing, argument, and taking of testimony on Claimant's motion to increase security and the complainant's response thereto is scheduled for 12/21/90 at 1:30 P.M.
Dec 6	22	NOTIFICATION of possible scheduling conflict by claimants'.
Dec 23	23	MOTION to increase Security hearing held before Bloch, J on 12-21-90 (Rep: Pat Sherman) claimant's motion to increase security is denied with exhibit attached by deft.
1991		
Jan 18	24	CLAIMANTS' MOTION to vacate or dissolve injunction and to stay by George and Suzanne Newman w/prop order.
Jan 22	25	CLAIMANTS' MOTION for summary judgment w/prop order.
Jan. 23	26	ORDER dated 1/23/91 that the opposing party file a reply brief no later than 2/19/91 to motion for summary judgment and brief in support by George Newman and Suzanne M. Newman. EOD: 1/23/91. (Bloch, J)
Jan 25	27	RESPONSE to claimants' motion to vacate or to dissolve injunction and to stay and supporting memorandum of law.
Jan 28	28	PRETRIAL STATEMENT of complainant Consolidation Coal Co.
Jan 29	29	Order dated 1-29-91 that the stay imposed by this Court on 7-20-90 prohibiting further prosecution of all action against Consolidation Coal Co, The Motor Vessel Elizabeth, or Barge No. MC 1029 shall be lifted to allow further prosecution of the suit filed by George and

DATE	NR.	PROCEEDINGS
		Suzanne Newman in the Court of Common Pleas of Allegheny County No. GD 90-00980, upon the filing with this court of the following stipulations by claimants; that claimants waive any claim of res judicata based upon any judgment obtained in the state court proceedings; that Consolidation Coal Company shall have the right to litigate all issues relating to its claims of limitation and exoneration of liability in the present proceeding; and that the issue of valuation of the limitation fund shall remain an issue to be resolved by this court as stated more fully in order. EOD: 1-29-91 Bloch, J. cm: all parties of record.
Feb 1	30	STIPULATION of claimants and their counsel.
Feb 4	31	ORDER dated 2-1-91 that the Clerk of Court mark the above captioned case closed; nothing contained in this order shall be considered a dismissal or disposition of this matter and should further proceedings become necessary or desirable either party may initiate it in the same manner as if this order had not been entered. EOD: 2-4-91 Bloch cm: all parties of record. NOTICES mailed.
1991		
Feb 11	32	TRANSCRIPT of proceedings held before Judge Bloch on 12-21-90 filed by Official Ct. Reporter Patricia Sherman.
Oct 8	33	NOTICE OF ENTRY OF APPEARANCE by Atty James R. Miller for deft Consolidated Coal Co. with jury trial demand.
Nov 14	34	PETITION by complainant's counsel to withdraw and substitute appearance by petitioner Thomas A. Smock, Esq. w/prop order.

DATE	NR.	PROCEEDINGS
Nov 14	w/34	ORDER dated 11-14-91 that the appearance of Thomas A. Smock, Esq. Leonard Fornella, Esq. and Polito & Smock, P.C. as counsel of record for complainant Consolidation Coal Co is withdrawn and the Clerk is instructed to so mark the docket. EOD: 11-14-91 Bloch, J. cm:all parties of record.
Nov 19	35	COMPLAINANT'S MOTION to modify stay and injunctions w/prop order.
Nov 20	w/35	ORDER dated 11-20-92 that the portion of the stay imposed by this court on 2-1-91, prohibiting the entry upon the docket of any judgment obtained in the state court action is hereby lifted; that portion of the stay and injunction imposed by this court on 2-1-91 is continued in effect against the enforcement of, or execution upon, the judgment obtained in the state court action at Allegheny County Court of Common Pleas GD90-00980. EOD: 11-20-92 Bloch, J. cm: all parties of record.
Nov 25	36	George Newman's Answer to Complainant's Motion to Modify Stay and Injunction with Proposed Order.
Dec 18	37	NOTICE OF APPEAL by George Newman, Claimant from order dated 11-20-91 FF—waived; TPO given.
Dec 18	—	Certified Copy of Notice of Appeal & docket entries, copy of information sheet & ORDER dated 11-20-92 appealed from mailed to USCA; copy of appeal & information sheet to Judge Bloch, deft's counsel; information sheet to appellant claimant; information sheet Ct. Reporter Pat Sherman.
Dec 28	—	NOTICE OF DOCKETING OF APPEAL at 92-3734.

DATE	NR.	PROCEEDINGS
Dec 28	38	TRANSCRIPT PURCHASE ORDER filed by appellant advising that an transcript is unnecessary for the appeal.
Dec 28	—	RECORD complete for appeal purposes, one certified copy of the docket entries to be filed as the certified list in lieu of the record to the USCA.
1993		
Jan 4	—	RECEIPT of receiving one certified copy of the docket entries in the USCA on 12-30-92
Jan 26	39	AFFIDAVIT of Counsel.
1993		
Jan 26	—	RECORD complete for appeal purposes, one certified copy of the docket entries to be filed and the certified list of lieu of the record to the USCA.
Feb 5	—	RECEIPT Of receiving 1st supplement in the USCA on 1-28-93.
Aug 4	40	CERTIFIED Copy of Judgment from the USCA that the judgment of the DC be and hereby affirmed; costs to be taxed against appellant. .
Aug 4	—	RECEIPT for same mailed to the USCA.
1995		
Jun 15	41	CLAIMANT's MOTION to Restore Case to Active Status w/prop order.
Jun 19	42	ORDER dated 6-19-95 that the opposing party file a response no later than 6-29-95 to the motion. EOD: 6-19-95 BLOCH, J cm: all parties of record
Jun 29	43	COMPLAINANT'S Response to Claimant's Motion to Restore Case to Active Status and Request for Status Conference w/prop order.

DATE	NR.	PROCEEDINGS
July 5	w/41	ORDER dated 7/5/95 that claimant George Newman's Motion to Restore Case to the active status is granted. The administrative dismissal of 2/1/91 is vacated and the case shall proceed to final adjudication. EOD: 7/5/95 (BLOCH, J.)
6/15/95	41	MOTION by GEORGE T. NEWMAN to Restore case to active status, with Proposed Order. (tt) [Entry dated 07/05/95]
7/5/95	—	ORDER upon motion granting claimant George Newman's [41-1] motion to Restore case to active status. The administrative dismissal of 2/1/91 is vacated and the case shall proceed to final adjudication. (signed by Judge Alan N. Bloch on 7/5/95) CM all parties of record. (tt)
7/5/95	—	Case reopened (tt)
7/6/95	42	Status Conference set for 3:30 7/31/95 (jad)
7/19/95	43	MOTION by GEORGE T. NEWMAN to Adopt the Finding of the Jury as the Findings of the Court with Proposed Order. (plh)
7/19/95	44	BRIEF by GEORGE T. NEWMAN in support of [43-1] motion to Adopt the Finding of the Jury as the Findings of the Court by GEORGE T. NEWMAN (plh)
7/26/95	45	BRIEF by CONSOLIDATION COAL in opposition to [43-1] motion to Adopt the Finding of the Jury as the Findings of the Court by GEORGE T. NEWMAN (plh)
7/27/95	46	BRIEF by GEORGE T. NEWMAN in support of [43-1] motion to Adopt the Finding of the Jury as the Findings of the Court by GEORGE T. NEWMAN (plh) [Entry date 07/28/95]
8/1/95	47	Status Conference held on 7-31-95 before Judge Alan N. Bloch [Reporter: Marilyn Brown] (plh)

DATE	NR.	PROCEEDINGS
8/1/95	—	Minute entry:, set Pretrial Order Deadlines: Discovery cutoff on 10/2/95; Complainant Consol's Pretrial Statements for Plaintiffs due 11/13/95; Claimant Newman's Pretrial Statements for Defendants due 10/23/95; Pretrial Conference set for 10:30 12/15/95; (plh)
8/2/95	48	TRANSCRIPT of Status Conference before Bloch, J. for dates of 7/31/95. Court Reporter: Marilyn Brown. (plh)
8/4/95	49	ORDER denying [43-1] motion to Adopt the Finding of the Jury as the Findings of the Court. (signed by Judge Alan N. Bloch on 8/4/95) CM all parties of record. (plh)
9/1/95	50	NOTICE OF APPEAL by GEORGE T. NEWMAN, SUZANNE M. NEWMAN from [49-1] order dated 8/4/95 TPO issued. (Filing Fee not paid) (plh)
9/1/95	—	Certified copy of Notice of Appeal [50-1] appeal by SUZANNE M. NEWMAN, GEORGE T. NEWMAN, certified copy of docket, certified copy of order mailed to USCA; copy of Notice of Appeal and information sheet to CONSOLIDATION COAL, court reporter(s) Pat Sherman, Marilyn Brown, and Judge. Copy of information sheet to appellant. (plh)
9/15/95	—	USCA Case Number Re: [50-1] appeal by SUZANNE M. NEWMAN, GEORGE T. NEWMAN USCA NUMBER: 95-3491 (plh)
10/26/95	51	NOTICE to counsel advising him to filed pltf's pretrial narrative statement by 11-1-95. (plh)
11/1/95	52	Certified copy of ORDER that a temporary stay of proceedings in the district court is granted to enable the Court of Appeals to receive and review an answer to the petition for

DATE	NR.	PROCEEDINGS
		writ of mandamus; the answer, if any, shall be filed with the Clerk of Court by 11-13-95 5:00 p.m., with copies sent to the Chambers of the Honorable Anthony J. Scirica and the Honorable Theodore A. McKee in Philadelphia, Pennsylvania and to the Chambers of the Honorable Carol Los Mansmann in Pittsburgh, PA. received from USCA re: [50-1] appeal by SUZANNE M. NEWMAN, GEORGE T. NEWMAN (plh)
12/1/95	53	Certified copy of ORDER received from USCA re: [50-1] appeal by SUZANNE M. NEWMAN, GEORGE T. NEWMAN that the Petition for Writ of Mandamus in 95-3479 is denied for failure of Petitioner to show a clear and indisputable right to the Writ; it is further ordered that the appeal at 95-3491 is dismissed because the court of appeals does not have jurisdiction at this time; the stay previously imposed is hereby dissolved. (plh)
12/4/95	54	MOTION by CONSOLIDATION COAL to Compel Discovery, and to Extend/Reopen Discovery with Proposed Order. (plh)
12/5/95	55	RESPONSE by GEORGE T. NEWMAN to [54-1] motion to Compel Discovery by CONSOLIDATION COAL, [54-2] motion to Extend/Reopen Discovery by CONSOLIDATION COAL (plh)
12/5/95	56	ORDER re: [54-1] motion to Compel Discovery that claimant submit response to Consol's 2nd Interrogatories by 1/5/96, re: [54-2] motion to Extend/Reopen Discovery, and to reset Case Management Order Deadlines: Discovery cutoff to 1/31/96; Pretrial Statements for Claimant due 2/21/95; Pretrial Statements for Complainant

due 3/13/96; Pretrial Conference set for 9:30 4/19/96; (signed by Judge Alan N. Bloch on 12/5/95) CM all parties of record. (rvb) [Entry date 12/06/95]

12/18/95 — Information sheet from USCA advising that a petition for rehearing on behalf of Appellant was filed on 11-13-95. (plh)

12/29/95 — Information sheet from USCA advising that an order was filed on 12-27-95 denying the petition for rehearing. (plh)

1/11/96 57 MOTION by CONSOLIDATION COAL to Compel Discovery with Proposed Order. (plh) [Entry date 01/12/96]

Cover of Petition for Writ of Mandamus and Statement of the Issues Presented

IN THE

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-3479

COMPLAINT OF CONSOLIDATION COAL COMPANY AS OWNER OF THE MOTOR VESSEL ELIZABETH and as CHARTERER OF BARGE NUMBER MC 1029, FOR EXONERATION FROM OR LIMITATION OF LIABILITY

PETITION FOR WRIT OF MANDAMUS OF GEORGE NEWMAN*, CLAIMANT/PETITIONER FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA DATED AUGUST 4, 1995 NOMINAL RESPONDENT, HONORABLE ALAN N. BLOCH CIVIL ACTION NO. 90-1206

PAUL L. HAMMER, ESQUIRE
SUZANNE M. SWAN, ESQUIRE
Attorneys for Claimant
518 Frick Building
Pittsburgh, PA 15219
(412) 261-0906

* Petitioner, a seaman seeking to enforce, inter alia, the Jones Act, 46 U.S.C. §688, is exempt from prepayment of fees and costs by 28 U.S.C. §1916

STATEMENT OF THE ISSUES PRESENTED

1. Is it a violation of the Seventh Amendment for a District Court hearing a single claimant non-concursus limitation of liability case in admiralty to re-examine any facts found by a state court jury in a Jones Act negligence and unseaworthiness case as to either liability and limitation or exoneration of liability issues of both?

2. Does a seaman's stipulation only to "waive any claim of *res judicata* based upon any judgment obtained in the state court proceeding." and that the shipowner "shall have the right to litigate all issues relating to its claim of limitation and exoneration of liability" in the admiralty court waive his Seventh Amendment rights when that subject is not mentioned in the stipulation which was entered into specifically to obtain that jury trial?

3. Assuming, *arguendo,* an admiralty court hearing a limitation of liability case can reexamine facts found by the state court jury, is the seaman entitled to a jury trial on that reexamination, which he properly and timely demanded, in his claim for Jones Act negligence and unseaworthiness pleaded in the limitation case?

Newman's Motion to Adopt the Findings of the Jury as the Findings of the Court

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 90-1206

COMPLAINT OF CONSOLIDATION COAL COMPANY, as Owner of the Motor Vessel Elizabeth and as Charterer of Barge Number MC 1029, for Exoneration From or Limitation of Liability.

CLAIMANT'S MOTION TO ADOPT THE FINDINGS OF THE JURY AS THE FINDINGS OF THE COURT

AND NOW, comes Claimant, George Newman,* (Mr. Newman) by his attorney, Paul L. Hammer, Esquire, and moves this Honorable Court to adopt the findings of the jury of the Court of Common Pleas of Allegheny County as the findings of this court. In support thereof, Mr. Newman alleges:

1. Complainant, Consolidation Coal Company (Consol) filed this admiralty action to limit its liability, 46 U.S.C. §§181, *et seq*, on or about July 20, 1990, some six months after Mr. Newman filed a tort personal injury action on the grounds of unseaworthiness and Jones Act, 46 U.S.C. §688 *et seq*, negligence against Consol, in the Court of Common Pleas of Allegheny County, Pennsylvania at G.D. 90-00980.

---

* Suzanne Newman was dropped from the case during the state court proceedings.

2. This court modified the injunction and administratively dismissed this action to accommodate Mr. Newman's right to a jury trial in the state court on or about February 1, 1991.

3. The jury found in answers to special interrogatories *inter alia* that Mr. Newman's injuries were the legal result of Consol's negligence and the unseaworthiness of its vessels. In addition, the final judgment set damages in excess of $1,000,000.00. A true and correct copy of the jury's answers to special interrogatories is attached hereto as Exhibit 1.

4. Consol's Request for Jury Instruction No. 8 submitted for the jury's decision the factual finding of what knowledge it had or reasonably should have had. Request No. 8 is quoted here:

> The definition of negligence requires the defendant to only guard against those risks or dangers of which it knew or by the exercise of due care should have known. In other words, the defendant's duty is measured by what a reasonably prudent person would anticipate or foresee resulting from particular circumstances.

A true and correct copy of Consol's Request for Jury Instructions is attached hereto as Exhibit 2.

5. The Honorable Patrick McFalls, the state trial judge, granted Consol's said request for instruction No. 8. He told the jury:

> Definition of negligence requires the Defendant only guard against those risks or dangers of which it knew or by the exercise of due care should have known. In other words the Defendant's duty is measured by what a reasonably prudent person would anticipate or foresee resulting from particular circumstances. Thus if you find that Plaintiff's injuries occurred as a result of a condition of the line

> which was not known to the Defendant and by exercise of due care would not have been known or known by or reasonably foreseen by the Defendant, you may find Plaintiff has not satisfied his burden of proving negligence on the part of the Defendant regarding the leaving line.

(Transcript, p. 760). A true and correct copy of Judge McFalls' complete charge is attached hereto as Exhibit 3.

6. Consol's privity and knowledge, actual or constructive, have been found as facts by the jury at Consol's own request.

7. The Superior Court affirmed the verdict and the Supreme Court of Pennsylvania denied Petitions for Allowance of Appeal on May 11, 1995.

8. On or about June 29, 1995, Consol conceded:

> Complainant concurs with Claimant in his assertion that, with the exception of issues concerning post-judgment interest and litigation costs relative to the State Court proceeding, said matter is effectively concluded for purposes of the within litigation.

(Complainant's Response to Claimant's Motion to Restore Case to Active Status and Request for Status Conference filed on or about June 29, 1995, page 2.)

9. There is now a state court judgment, which Consol conceded on or about June 29, 1995 is final.

10. A decision to reexamine the facts found by the jury or the judgment of the Pennsylvania courts in this case would necessarily require a determination of the Federal constitutional questions, *inter alia*, listed below.

11. The Seventh Amendment to the Constitution of the United States of America precludes a reexamination

of the facts found by the jury in these circumstances. No court has jurisdiction to redetermine those facts found by the jury.

12. The Pennsylvania judgment is entitled to full faith and credit via Article IV, Section I of the Constitution of the United States of America, which Congress has applied to the Federal Courts, 28 U.S.C. §1738.

13. Consideration of federalism and comity bar an intrusion by the lower federal courts into the judgment of the courts of the Commonwealth of Pennsylvania in this controversy.

14. Additionally, sound judicial economy would not be served by a wasteful second trial on the established facts in this lengthy litigation.

15. No federal court other than the Supreme Court of the United States has jurisdiction to review the judgment of the courts of the Commonwealth of Pennsylvania in this dispute. Hence, this Honorable Court lacks such jurisdiction.

16. Throughout the course of the litigation in state court Consol repeatedly and consistently argued that it did not inspect the rope that failed, causing Mr. Newman's injuries. A true and correct copy of that part of Consol's brief in Support of Its Motion for Post-Trial Relief is hereto attached as Exhibit 4.

17. The rope involved in this case was on the open deck of Consol's vessel and easily could have been inspected.

18. The jury's finding that consol unreasonably failed to inspect the rope involved precludes a contrary finding. Therefore, that fact is established for the purposes of this case.

19. Consol waived the protection of this court's injunction by actually litigating and submitting the knowledge issue to the jury for decision. Consol's claim of lack of privity and knowledge is inextricably intertwined with the merits of the state court judgment and review of the state court's decision is forbidden.

20. A decision to reject the jury's findings in this federal litigation would necessarily deprive Mr. Newman of his right to a jury trial which was the essential purpose for the February 1, 1991 modification of the injunction through application of the "saving to suitors" clause, 28 U.S.C. §1333.

21. Consol is judicially estopped from arguing to this Honorable Court that it reasonably inspected the rope involved after it maintained the opposite position throughout the Pennsylvania courts.

Respectfully submitted,

s/ PAUL M. HAMMER
Paul L. Hammer
Attorney for Claimant

Jury Answers to Special Interrogatories

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

No. G.D. 90-00980

SPECIAL INTERROGATORIES

GEORGE NEWMAN,

Plaintiff,

vs.

CONSOLIDATION COAL COMPANY,
a corporation,

Defendant.

SPECIAL INTERROGATORIES

1. WAS THERE ANY NEGLIGENCE UNDER THE JONES ACT ON THE PART OF THE DEFENDANT WHICH WAS A CAUSE IN ANY PART WHATSOEVER, NO MATTER HOW SMALL, IN BRINGING ABOUT PLAINTIFF'S INJURIES?

YES ✓ (11) NO ___ (1)

2. WAS THERE ANY UNSEAWORTHINESS OF THE VESSELS OR THE LEAVING LINE WHICH WAS A PROXIMATE CAUSE OF PLAINTIFF'S INJURIES?

YES ✓ (12) NO ___ (0)

IF THE ANSWERS TO QUESTIONS NO. 1 AND NO. 2 ARE "NO", YOU SHOULD NOT PROCEED ANY FURTHER. HOWEVER, IF THE ANSWERS TO EITHER QUESTIONS NO. 1 OR NO. 2 ARE "YES", PLEASE PROCEED TO QUESTION NO. 3.

3. WAS THERE ANY NEGLIGENCE ON THE PART OF THE PLAINTIFF WHICH CONTRIBUTED, IN WHOLE OR IN PART, TO HIS OWN INJURIES?

YES ✓ (10) NO ___ (2)

4. IF THE ANSWER TO QUESTION NO. 3 IS "YES", BY WHAT PERCENTAGE DID THE PLAINTIFF'S NEGLIGENCE CONTRIBUTE TO HIS OWN INJURIES?

11.83%

5. WHAT AMOUNT OF DAMAGES, IF ANY, EXPRESSED IN DOLLARS, DID PLAINTIFF SUSTAIN AS THE RESULT OF THE ACCIDENT ON THE 27TH DAY OF APRIL, 1989?

$1,327,000.00.

FOREPERSON: s/ MARY YVONNE YOCHUM
DATE: November 25, 1991

Excerpts From Consolidation's (Consol) Requests for Jury Instructions in State Court

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

No. G.D. 90-00980

Issue No. 141515

Code 009-Trespass-Other

REQUEST FOR JURY INSTRUCTIONS

GEORGE NEWMAN and SUZANNE
M. NEWMAN, his wife,

Plaintiffs,

v.

CONSOLIDATION COAL COMPANY,
a corporation,

Defendant.

Filed on behalf of:
CONSOLIDATION COAL COMPANY,
Defendant

Counsel of Record for this Party:

Leonard Fornella, Esquire
Pa. I.D. No. 27921

POLITO & SMOCK, P.C.
Suite 400 Four Gateway Center
Pittsburgh, PA 15222
(412) 392-3500

REQUEST FOR JURY INSTRUCTIONS

Defendant, CONSOLIDATION COAL COMPANY, requests that the Court include the following instructions in its charge to the jury:

1. Under the law and all the evidence in this case, you must find a verdict against plaintiffs and in favor of defendant.

2. You must consider and determine this case as litigation between persons of equal standing in the community. You should not be influenced or affected by the fact that the defendant is a corporation; nor should you be in any way influenced by any thoughts or ideas you may have as to the financial standing of any party to this litigation. Such matters have no proper place in a case of this kind. This case is to be considered and determined by you in the same unbiased way as you would consider and determine a case between two private individuals of equal standing.

3. Plaintiffs have made a claim against defendant

* * *

[4] defendant, plaintiffs have not satisfied their burden of proving negligence on the part of defendant.

10. There is no evidence in this case that the defendant had any actual and prior knowledge of any condition relating to the line which would have caused it to break. Thus, you must determine whether or not any employee or agent of defendant, other than plaintiff, should have, in the exercise of reasonable care, performed an inspection of the line prior to plaintiff husband's accident. If you find that no employee or agent of defendant, other than plaintiff, had the

opportunity or duty to inspect the line prior to plaintiff husband's use of the line, the condition of the line would not have been anticipated or reasonably foreseen by defendant and you cannot under these circumstances find negligence on the part of the defendant.

11. Even if you find that defendant was negligent, plaintiffs also have the burden of proving that defendant's negligence was a cause of plaintiff husband's accident and injuries.

12. Thus, in order to find defendant liable under plaintiffs negligence claim, you must be satisfied that plaintiffs have met their burden of proving, by a preponderance of the credible evidence, that defendant was negligent and also that defendant's negligence was a cause of

* * *

Excerpt From State Trial Judge's Instructions to the Jury

[760] from the evidence in the case that any negligence of the Defendant contributed in any way toward any damages or injuries suffered by the Plaintiff, you may find that such injury or damage was caused by the Defendant's act or omission. Negligence may be a cause of damage even though it operates in combination with the act of another, some natural cause or some other cause if such other cause occurs at the same time as the negligence and if the Defendant's negligence played any part, no matter how small, in causing such damage.

Definition of negligence requires the Defendant only guard against those risks or dangers of which it knew or by the exercise of due care should have known. In other words the Defendant's duty is measured by what a reasonably prudent person would anticipate or foresee resulting from particular circumstances. Thus if you find that Plaintiff's injuries occurred as a result of a condition of the line which was not known to the Defendant and by exercise of due care would not have been known or known by or reasonably foreseen by the Defendant, you may find Plaintiff has not satisfied his burden of proving negligence on the part of the Defendant regarding the leaving line. If a preponderance of the evidence does not support the Plaintiff's Jones Act claim for negligence, then your verdict should be for the Defendant on this issue. If,

* * *

Excerpts From Consol's Brief In Support of its Motion for Post Trial Relief in State Court

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

No.

GEORGE NEWMAN and SUZANNE NEWMAN, his wife,

Plaintiffs,

v.

CONSOLIDATION COAL COMPANY,

Defendants.

DEFENDANT'S BRIEF IN SUPPORT OF ITS MOTION FOR POST-TRIAL RELIEF PURSUANT TO PA. R.C.P. 227.1

I. INTRODUCTION

On November 25, 1991, a jury returned a verdict in favor of Plaintiffs, George and Suzanne M. Newman in the above-captioned matter. On December 3, 1991, Defendant, Consolidation Coal Company, filed post-trial motions pursuant to Pa. R.C.P. 227.1 alleging several points of error including improper jury instructions, the Trial Court's failure to grant Defendant's motion for a mistrial and numerous prejudicial actions by Plaintiff's counsel. Defendant now supplements its motion with the within brief.

The facts of this case can be briefly summarized as follows: The Plaintiff, George Newman was classified as a welder/skilled laborer for the Defendant, Consolidation Coal Company on April 27, 1989. On that date, Plaintiff was working as a deck hand on the Motor Vessel Elizabeth, a vessel owned and operated by the Defendant. Plaintiff was injured when, while

* * *

[16] Defense counsel's opening that relates to this insinuation regarding labor strife. Merely because Defense counsel in his opening gave some background information regarding his client, does not give Mr. Hammer the license to bring up irrelevant and prejudicial information by insinuation. Clearly, this statement was beyond the scope of the evidence presented and was therefore improper. *Rockovitz, supra.*

Mr. Hammer's entire closing argument was designed to depict the Defendant as a bad and horrible company warranting punishment. The statements were prejudicial and therefore warrant a new trial.

E. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY IN ACCORD WITH DEFENDANT'S SUPPLEMENTAL POINTS FOR CHARGE NOS. 5 AND 6 AND IN GRANTING PLAINTIFFS' POINT FOR CHARGE NO. 4.

The next errors alleged by the Defendant in its motion or post-trial relief relate to jury instructions regarding Plaintiff's responsibilities to his employer and Defendant's duty to the Plaintiff. Defendant's supplemental points for charge numbers 1 and 2 relate to Plaintiff's duty to inspect the line that allegedly broke. In this regard, supplemental point for charge number 1 reads as follows:

> The Plaintiff cannot recover on the basis of an unseaworthy condition which is due wholey and solely to a failure on his part to perform the responsibilities that were assigned to him. Therefore, if you find that the rope was an unseaworthy condition and also find that the unseaworthy condition of the rope was due to a failure on Mr. Newman's part to inspect the rope prior to using it, then you must find for the Defendant in this case. *Peymann v. Perini Corp.*, 507 Fed.2d 1318, 1321 (5th Cir. 1974).

[17] Supplemental point for charge number 2 reads as follows:

> If you find that the duty to inspect the rope prior to using it was solely a duty which Mr. Newman owed to his employer to perform, and if you find that the condition of unseaworthiness which was the cause of Plaintiff's accident was due solely to the failure of the Plaintiff to carry out his duty to his employer to inspect the rope prior to using it, then you may find for the Defendant in this case. *Peymann v. Perini Corp.*, 507 Fed.2d 1318, 1321 (5th Cir. 1974). *Walker v. Lykes Bros. S.S. Co.*, 193 F.2d 772 (2d Cir. 1952); *Reinhart v. United States*, 457 F.2d 151 (L9th Cir. 1972); *Buckner v. State Boat Operators, Inc.*, 680 F. Supp. 239 (E.D.La. 1988).

Defendant contends that the Trial Court erred in failing to grant these points for charge.

Additionally, the Trial Court erred in instructing the jury using the Plaintiff's point for charge number 4, which states:

> Consol as a shipowner owed to Mr. Newman as a member of the crew of the vessels employed aboard the vessels the nondelegable duty to keep and maintain the vessels and all gear, tools, and equipment of the vessel in the seaworthy condition at all times.

Plaintiff's Point for Charge No. 4

In failing to grant Defendant's supplemental points for charge number 1 and 2 and in granting Plaintiff's point for charge number 4, the Trial Court failed to recognize the relevant case law regarding the Plaintiff's duty to Defendant, and Defendant's duty to the Plaintiff. A new trial should be granted where the charge of the trial judge does not contain complete instructions on a matter of law which is essential to the jury's proper consideration of the case. *Gnowchoski v. Ardes*, 47 Del. 328 (1960), *aff'd* 402 Pa. 614, 168 A.2d (1960).

[18] As noted previously, Plaintiff brought the present action under the general maritime warranty of seaworthiness and the Jones Act, 46 U.S.C.A. §688. Pursuant to the warranty of seaworthiness, "a ship owner has an absolute and nondelegable duty to furnish a seaworthy vessel and appurtenances that are reasonably safe and fit for their intended use." *Gaddis v. Orgulf Transport, Co.*, 680 F. Supp. 1279, 1282 (S.D. Ill, 1988). Generally, a seamen's contributory negligence will reduce the amount of damages recoverable from the owner, but does not extinguish the seamen's right to recover. *Gaddis*, 680 F. Supp. at 1282. However, an exception known as the "primary duty" doctrine can operate to bar Plaintiff's recovery.

Pursuant the primary duty rule, "a seamen-employee may not recover from his employer for injuries caused by his own failure to perform a duty imposed on him by his employer." *California Home Brands, Inc. v. Ferreira*, 871 F.2d 830, 836 (9th Cir. 1989). In this regard, "the plaintiff must have breached some *positive* duty for the rule to apply . . ." *California Home Brands*, 871 F.2d at 836.

Under the facts of the case at hand, all the witnesses in this case, except one, (the Plaintiff), testified that it was the Plaintiff's responsibility, as a deck hand, to

inspect the line. Timothy Stinson, the pilot of the MV Elizabeth on the day in question, testified that it was the Plaintiff's responsibility to inspect the line before using it. (Trial Record at pp. 157, 159). Indeed, Mr. Stinson testified that it was the deck hand's responsibility to discard old leaving line. (Trial [19] Record at p. 145). The Plaintiff's responsibility, with respect to inspecting the line, related to the fact that as a deck hand he was responsible for untying lines and hooking up barges. (Trial Record at pp. 142, 143). Mr. Stinson also testified that the Plaintiff took the time each day to coil up the leaving line before using it. (Trial Record at pp. 153, 154).

Similarly, Michael Hughes, the assisting operating manager testified that it was the deck hand's responsibility, not management's, to inspect the line. (Trial Record at pp. 204, 105, 218, 229). Indeed, he stated that it was the policy of the Defendant that the deck hand had the responsibility of inspecting the line before using it. (Trial Record at p. 209). The reason this responsibility fell upon the deck hand was because he was the person who must work with the line. (Trial Record at p. 210).

Tom Brown, the general foreman, corroborated with Mr. Stinson's and Mr. Hughes' testimony. In this regard, Mr. Brown testified that it had been the deck hand's responsibility to check the leave lines for 20 years. (Trial Record at pp. 290, 291). Additionally, Mr. Brown added that it was up to the deck hand to tell the foreman that he needed more line. (Trial Record at p. 293).

Warren Dean Orr and Louis Truntich, both employees of the Defendant, also testified that it was the deck hand's responsibility to check the leave lines. (Trial Record at pp. 457, 540).

Only the Plaintiff denied that it was his responsibility to inspect the line. However, in this regard, the [20] Plaintiff acknowledged that he only "glanced at" the lines even though he considered himself to be the best deck hand that the Defendant ever had. (Trial Record at p. 418). Despite admitting that he only "glanced at the lines," the Plaintiff subsequently acknowledged that he never wore gloves so that he could actually feel the line go through his hands to determine whether there were any kind of cuts, burns or other defects in the line. (Trial Record p. 430). He finally acknowledged that it was his responsibility to make sure that he had good line for the barge. (Trial Record at p. 432).

All the testimony summarized above points to one conclusion; the Plaintiff had the primary duty to inspect the line. In this regard, the law is clear in holding that when a seamen is the cause of his own misfortune, he will be barred from recovery. *Gaddis*, 680 F.Supp. at 1282.

Defendant's Supplemental points for charge numbers 1 and 2 address the primary duty rule. The Trial Court refused these instructions. (Trial Record at pp. 695, 706). In light of the above, this was error. The Defendant was entitled to have those instructions read to the jury.

Similarly, the Trial Court erred in granting Plaintiff's point for charge number 4. While at face value this instruction seems a correct statement of the law, in light of the Trial Court's error in refusing to use Defendant's Supplemental points for charge numbers 1 and 2, the Court's instructions were incomplete and, as a result, did not accurately state the [21] applicable law. The primary duty rule is an exception to the nondelegable duty to the Plaintiff. The Trial Court's failure to use the instructions relating to this doctrine mislead the jury.

Thus, the Trial Court committed reversible error when it failed to instruct the jury regarding the primary duty rule. Accordingly, Defendant is entitled to a new trial.

F. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT THE MERE HAPPENING OF AN ACCIDENT IS NOT PROOF OF DEFENDANT'S LIABILITY.

As part of its point for charge, Defendant supplied the Trial Court with the following charge:

> The mere happening of an accident does not make a Defendant liable; nor does it raise any presumption of negligence or fault on the part of a Defendant. Accidents frequently occur through no one's fault. The burden of proof is upon Plaintiff to prove, by a preponderance of the evidence, that the Defendant was negligent and that Plaintiff's injury was causally related to such negligence.

Defendant's Point for Charge No. 13. In ruling on the various charges offered by both parties, the Trial Court refused to use that instruction (Trial Record at p. 708). This was error.

A new trial should be granted where the charge of the trial judge does not contain complete instructions on a matter of law which is essential to the jury's proper consideration of the case. *Gnowchoski v. Ardes*, 47 Del. 328 (1960), *aff'd* 402 Pa. 614, 168 A.2d (1960).

In *Gaddis v. Orgulf Transport Co.*, 680 F. Supp. 1279 (S.D. Ill. 1988) the Court held, in a case based upon the warranty of seaworthiness and the Jones Act that:

* * *

[28] case law, reveals that Defendant's request for a new trial on all issues should be granted.

Respectfully submitted,

DICKIE, McCAMEY & CHILCOTE, P.C.

s/ By JAMES R. MILLER
James R. Miller, Esquire

Attorneys for Defendant,
Consolidation Coal Company

Newmans' Appearance In United States District Court for the Western District of Pennsylvania with Jury Demand

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 90-1206

JURY TRIAL DEMAND

COMPLAINT OF CONSOLIDATION COAL COMPANY, as OWNER of the MOTOR VESSEL ELIZABETH and as Charterer of BARGE NUMBER MC 1029, FOR EXONERATION FROM OR LIMITATION OF LIABILITY.

APPEARANCE

TO: Catherine Martrano, Clerk

Please enter my appearance for George Newman and Suzanne M. Newman, his wife, in the above case.

s/ PAUL L. HAMMER
Paul L. Hammer
Attorney for George Newman and Suzanne M. Newman, his wife

Date: 7/26/90

Newmans' Motion to Vacate or Dissolve Injunction and to Stay

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 90-1206

COMPLAINT OF CONSOLIDATION COAL COMPANY, as Owner of the Motor Vessel Elizabeth and as Charterer of Barge Number MC 1029, for Exoneration from or Limitation of Liability.

CLAIMANTS' MOTION TO VACATE OR DISSOLVE INJUNCTION AND TO STAY

Claimants, George Newman and Suzanne M. Newman, his wife, respectfully move this Honorable Court to dissolve or vacate the Injunction entered in this case and to stay the prosecution of this case in this Honorable Court. In support thereof, Mr. and Mrs. Newman allege:

1. Mr and Mrs. Newman seek to recover against Consolidation Coal Company under the Jones Act, 46 U.S.C. §688, and for breach of warranty of seaworthiness. Alternatively, Claimants seek to recover for negligence under Section 5(b) of the Longshoreman and Harbor Workers' Compensation Act, 33 U.S.C. §905(b).

2. Mr. Newman suffered severe personal injuries while working on Consol's vessels on or about April 27, 1989.

3. Mr. and Mrs. Newman filed suit against Consolidation Coal Company on January 17, 1990, in the Court of Common Pleas of Allegheny County, Pennsylvania, at GD 90-00980.

4. On or about July 20, 1990, Consol filed this action to limit its liability and obtained that same date an Injunction barring the Newmans from prosecuting their prior action in State Court.

5. In that same Injunction, the Court ordered that all claims must be filed on or before September 15, 1990, or in default thereof such claims be forever barred.

6. The Honorable Court's Injunction was duly and timely advertised by Consol and proof thereof filed.

7. No claimants other than Mr. and Mrs. Newman have appeared. Therefore, this is a single claimant's case, Mrs. Newman's consortium rights being derivative of her husband's.

8. To obtain the Order Mr. and Mrs. Newman now request, Claimants and their counsel hereby stipulate, intending to be legally bound, (1) that this Honorable Court has sole and exclusive jurisdiction of any and all issues relating to Consol's attempt to limit its liability arising from Mr. Newman's aforesaid injuries; (2) Mr. and Mrs. Newman and Mr. Hammer also stipulate that no State Court judgment will be res judicata as to any limitation fact or issue in the limitation proceeding; and (3) finally, Mr. and Mrs. Newman and Mr. Hammer stipulate that they will confine the Newmans' action to the case pending in the Court of Common Pleas of Allegheny County, Pennsylvania, cited in paragraph 3 above.

9. There will be no prejudice to Consol by the granting of this Motion:

(a) If Consol secures a defense judgment in State Court, the case is over without further requiring any action of this Honorable Court;

(b) If Mr. and Mrs. Newman win a judgment less than the limitation fund in State court, again this Honorable Court will not be required to take any action;

(c) If Mr. and Mrs. Newman obtain a judgment in State Court in excess of the limitation fund, all limitation issues will be decided in this Honorable Court.

10. Mr. and Mrs. Newman, on the other hand, will be severely prejudiced if the Injunction remains in effect because they will be deprived of their right to prosecute this Case in State Court granted to them by Congress in the Savings to Suitors clause, 28 U.S.C.A. §1333 (Suitors in Admiralty are entitled to a common law remedy where the common law is competent to give it). Mr. and Mrs. Newman will further be severely prejudiced if their Motion is not granted because they will be deprived of their right to a jury trial granted to them by the Constitution of the United States of America.

11. The valuable time and assets of this Honorable Court will be conserved if the Newmans' Motion is granted and the Injunction vacated or dissolved and the case stayed. This Honorable Court may well be spared any further proceedings in this case and the case may be removed from this Honorable Court's Docket without further action.

WHEREFORE, Claimants George Newman and Suzanne M. Newman, his wife, respectfully move this Honorable Court to dissolve or vacate the Injunction entered on July 20, 1990, and to stay any further action in this Proceeding until after the termination of the proceedings in the Court of Common Pleas of Allegheny County, Pennsylvania.

Respectfully Submitted,

s/ PAUL L. HAMMER
Paul L. Hammer
Attorney for Claimants

Stipulation of Claimants and Their Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 90-1206

COMPLAINT OF CONSOLIDATION COAL COMPANY, as Owner of the Motor Vessel Elizabeth and as Charterer of Barge Number MC 1029, for Exoneration from or Limitation of Liability.

STIPULATION OF CLAIMANTS AND THEIR COUNSEL

Claimants, George Newman and Suzanne M. Newman, his wife, and their Attorney, Paul L. Hammer, Esquire, hereby stipulate and agree to the following:

1. The Claimants waive any claim of *res judicata* based upon any judgment obtained in the State Court proceeding.

2. Consolidation Coal Company shall have the right to litigate all issues relating to its claims of limitation and exoneration of liability in the present proceeding at the above caption.

3. The issue of valuation of the limitation fund shall remain an issue to be resolved by the United States District Court for the Western District of Pennsylvania in the case captioned above.

s/ PAUL L. HAMMER
Paul L. Hammer
Attorney for Claimants

Transcript of Status Conference
of July 31, 1995

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 90-1206
Pittsburgh, Pennsylvania
July 31, 1995, 3:50 PM

CONSOLIDATION COAL COMPANY,
Plaintiff,

vs.

GEORGE T. NEWMAN and
SUZANNE M. NEWMAN,
Defendants.

TRANSCRIPT OF STATUS CONFERENCE
BEFORE HONORABLE ALAN BLOCH,
DISTRICT JUDGE

APPEARANCES:

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Official Reporter:
Marilyn Brown
1025 United States Court House
Pittsburgh, Pennsylvania 15219
Telephone: (412) 355-0687

Proceedings recorded by mechanical stenography.
Transcript produced by computer-aided transcription.

(In the conference room at 3:50 PM
on July 31, 1995.)

THE COURT: This is the date and time we have set for a status conference in the matter of Consolidation Coal vs.—not versus anybody, I guess, for a limitation of liability award at Civil Number 90-1206. I guess the purpose of today's conference is to set a schedule for just where we stand and where we're going from here, and I know that although I haven't looked it over, there was a motion filed to adopt the jury's findings in State Court, and I thought, Mr. Hammer, that we had a stipulation that we weren't to do that.

MR. HAMMER: No, Your Honor. We stipulated that we would not invoke res judicata. That's not why we're here. We're here asking the Court by this motion to do only one thing, and that is to take the findings of the State Court jury and then the Court will proceed—as

I envision it, this Court will then proceed to go ahead and consider and litigate the question of Consol's rights in the petition that has been filed in the case.

THE COURT: Okay. What's your position, Mr. Miller?

MR. MILLER: Your Honor, our position is that there's a stipulation on record signed by Mr. Hammer and approved by this Court which specifically states, number one, that there will be no claim of res judicata based on any judgment obtained in State Court, but in addition, it also states that "Consolidation Coal Company shall have the right to litigate all issues relating to its claim of limitation and exoneration of liability in the present proceeding at the above caption," and we believe we—

THE COURT: Well, isn't what we have to do is just determine whether they have a limitation of liability? And then you can go ahead and do whatever you want with whatever judgment you got in State Court.

MR. HAMMER: Yes, sir.

THE COURT: So I don't have to do anything except determine in this case—

MR. HAMMER: Yes, sir, but—

THE COURT: —the limitation of liability. I don't have to adopt anything.

MR. HAMMER: Well, I think, Your Honor, to protect Mr. Newman's rights under the Seventh Amendment, that to decide this case, Mr. Newman is entitled to have those jury findings given weight by this Court.

THE COURT: Why would I give those jury findings weight as to whether they're entitled to a limitation of liability?

MR. HAMMER: Because if you recall, in a limitation of liability case, it's a split procedure. First Mr. Newman has to establish the liability of the defendant—of Consol, rather, to him. He has proven in State Court that consol was negligent, its vessels were unseaworthy, that those conditions were the legal cause of his injuries. His injuries are liquidated there in an amount that exceeds the limitation fund. He has proven all of those things. A jury has found them. So once that happens, it then comes to Consol, who bears the burden of proof on this, to prove that they are without privity or knowledge of the conditions that injured Mr. Newman. So my thought—

THE COURT: I take it you still contest liability. Is that it?

MR. MILLER: That's correct, Your Honor, and that has been stipulated to.

THE COURT: What did you give up? When you gave up your right that nothing would be res judicata, what were you giving up?

MR. HAMMER: I was giving up the right, which Mr. Newman did not have and could not have, to have a State Court say, "We are determining the right to Consol to limit the liability." The State Court has done no such thing. We didn't ask the State Court to do that.

THE COURT: I don't interpret the stipulation to be limited to that.

MR. HAMMER: May I know how you interpret the limitation, please?

THE COURT: I'm not going to interpret it officially until we go through your briefs, but my impression is that's not what was meant by the stipulation

MR. HAMMER: I was going to—

THE COURT: We're going to issue some kind an order on your motion and we'll deal with the reasoning behind it then, but for purposes of setting a pretrial schedule, I would assume that I'm not going to do that, that I'm not going to adopt the State Court findings. For purposes of setting a schedule, if I decide otherwise, I can modify it.

MR. HAMMER: You will issue an order to that effect?

THE COURT: Sure. I want to give you the chance to go before the Circuit, Mr. Hammer.

Okay. Now let's talk about what we're going to do scheduling wise, and I guess, Mr. Miller, you will be going first. Or I guess it's Mr. Hammer who as the claimant will have to prove liability first.

MR. MILLER: Yes.

THE COURT: What do you have in mind in the way of discovery that you want to conduct?

MR. HAMMER: Your Honor, I don't need any more discovery. We had exhausted your earlier discovery schedule a couple—several years ago.

THE COURT: Mr. Miller, do you have any discovery to complete?

MR. MILLER: Just two items. First of all, Your Honor, I was not counsel of record in the prior limitation action, but from what I can see, there were potentially two areas where there might be a need for discovery.

THE COURT: Okay. Tell me what those are.

MR. MILLER: One, there was an indication before the case was transferred, so to speak, to the State Court that Mr. Hammer was going to supplement some answers to interrogatories. From reviewing the file, I think that may have been with regard to experts. Now in the State Court proceeding, which I did try, Your Honor, he did not produce any experts. So that may be moot.

THE COURT: Okay. Is it?

MR. HAMMER: If you are talking about experts as to the condition of the rope, it is accurate. There were many medical experts.

THE COURT: Okay. So he would still call the same, I take it, medical experts that he has called in State Court to prove his case here. Okay. You don't have to do any discovery about that. I take it you have heard all that.

MR. MILLER: Yes.

THE COURT: Okay.

MR. MILLER: The only other issue, Your Honor, it was raised in response to the limitation complaint by Mr. Hammer that the action was not filed in a timely fashion, and if he continues to assert that defense, then we would like to have the basis for same and any witnesses or the reasoning for it. Because we do believe it was timely filed.

THE COURT: Okay. Are you still maintaining that?

MR. HAMMER: We do, Your Honor, but one of the difficulties is, because discovery had ended, in accordance with the Rules, we had filed—I think back in

January of '91, we had filed in this Court a motion for summary judgment which, because you stayed the case on February 1st of '91, went off in limbo. We think that is now alive again, and I'm reluctant to have discovery opened again—Assuming you're right on the jury findings, I'm reluctant to have discovery opened again after we filed our motion summary judgment.

THE COURT: Well, I don't stop discovery when people file motions for summary judgment.

MR. HAMMER: I think you're supposed to wait until discovery is over before you do it then.

THE COURT: You show me the rule that says that, Mr. Hammer. We regularly continue discovery until it is completed, having nothing to do with any motions, motion to dismiss, motion for summary judgment. It doesn't stop that. And I don't believe that there is any rule that you are citing to that requires that. We want discovery to get over with so that once the motions are decided, we can go right into trial.

So do I understand that there is some discovery you want to do?

MR. MILLER: Yes, sir.

THE COURT: And that's on the statute of limitations question?

MR. MILLER: On the timeliness of the filing of the limitation action.

THE COURT: What do you intend to do on that?

MR. MILLER: I would begin with just interrogatories to see if there is any basis for it. Perhaps some depositions, but nothing extensive.

THE COURT: Is 60 days enough time?

MR. MILLER: It is, Judge.

MR. HAMMER: Your Honor, may I suggest—Let me tell you what the basis for that is, and I think you may conclude that we have been through that heavily. The basis for this was that at the time Mr. Newman was injured, Consol's employees and agents were there. They took him to the hospital. Certain workmen's compensation papers were filed at that time which would have indicated at that time in writing in Consol's files that the claim exceeded the value of the vessels. We have been through all that in production of documents. Mr. Miller was right. He was not counsel while we were doing that. We have been through that with production of documents, we have been through that with I think practically every single one of Consol's employees. Mr. Newman of his own knowledge knows nothing. He got his copy of that warning and doesn't remember anything until he woke up in the hospital a few days later. So I think that discovery is all done, Judge.

THE COURT: He doesn't seem to think it is.

MR. MILLER: I would just like to make sure, Judge, and I think it is more detailed than that, from our position.

THE COURT: Okay. Well, we now have this motion to decide. We now have a summary judgment motion to decide that you say you've already filed.

MR. HAMMER: I'm going to ask the Court when discovery is over for leave then to augment that summary judgment motion, please.

THE COURT: Okay. Does that have to do with this issue that he wants to discover?

MR. HAMMER: It may well.

THE COURT: Okay. Well, then we shouldn't decide the summary judgment motion until discovery is over. Is that what you're saying?

MR. HAMMER: Please.

THE COURT: Okay. Rebecca, we're going to have a 60-day discovery period, and then you will give dates for filing of pretrial statements and for a pretrial conference.

Any supplements to your motion for summary judgment must be filed within 14 days after the close of discovery, accompanied by supporting documents and a brief.

Now she's going to give you dates for filing your pretrial statements and for a pretrial conference.

MS. ROSS: Discovery will close on October 2nd, 1995. The claimant's pretrial statement would be due first?

THE COURT: Yes.

MR. HAMMER: Theirs has already been filed.

THE COURT: They might have to supplement it now.

MS. ROSS: It will be due on October 23rd, 1995.

THE COURT: Claimant's will be due. That's Mr. Hammer's.

MS. ROSS: Mr. Hammer's. The complainant's pretrial statement will be due on November 13. The pretrial conference will be held on Friday, December 15, 1995, at 10:30 AM. That's Friday, December 15, 1995, at 10:30 AM.

THE COURT: Okay. We've already dealt with summary judgment motions. I think that's it. The transcript of this conference is the Order of the Court, and upon request, the reporter will transcribe at the cost of the requesting party.

MR. HAMMER: So requested.

MR. MILLER: Also. Thank you, Your Honor.

(Adjournment at 4:05 PM.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

MARILYN BROWN
Marilyn Brown, Official Reporter

CONSTITUTION

Constitution of the United States of America

"AMENDMENT VII

In suits at common law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

STATUTES

28 U.S.C.

§1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

(As amended May 24, 1949, c. 139, §79, 63 Stat. 101.)

§1445. Nonremovable actions

(a) A civil action in any State court against a railroad or its receivers or trustees, arising under sections 51-60 of Title 45, may not be removed to any district court of the United States.

(b) A civil action in any State court against a common carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments, arising under section 11707 of title 49, may not be removed to any district court of the United States unless the matter in controversy exceeds $10,000, exclusive of interest and costs.

(c) A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States.

(d) A civil action in any State court arising under section 40302 of the Violence Against Women Act of 1994 may not be removed to any district court of the United States.

(June 25, 1948, c. 646, 62 Stat. 939; July 25, 1958, Pub.L. 85-554, §5, 72 Stat. 415; Oct. 17, 1978, Pub.L. 95-473, §2(a)(3)(A), 92 Stat. 1465; Oct. 20, 1978, Pub.L. 95-486, §9(b), 92 Stat. 1634; Sept. 13, 1994, Pub.L. 103-322, Title IV, §40302(e)(5), 108 Stat. 1942.

§1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

(As amended May 24, 1949, c. 139, §90, 63 Stat. 102.)

§51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents, and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

(Apr. 22, 1908, c. 149 §1, 35 Stat. 65; Aug. 11, 1939, c. 685, §1, 53 Stat. 1404.)

§56. Actions; limitations; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

(Apr. 22, 1908, c. 149, §6, 35 Stat. 66; Apr. 5, 1910, c. 143, §1, 36 Stat. 291; Mar. 3, 1911, c. 231, §291, 36 Stat. 1167; Aug. 11, 1939, c. 685, §2, 53 Stat. 1404; June 25, 1948, c. 646, §18, 62 Stat. 989.)

46 U.S.C. §183(a)

"The liability of the owner of any vessel, whether American or foreign, for any embezzlement loss or destruction by any person of any property, goods or merchandise shipped or put on board of such vessel, or for any act, matter or thing, loss damage or forfeiture, done, occasioned or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

46 U.S.C. §688

* * *

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."[104]

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[104]. 41 Stat. 1007 (1920); 46 U.S. CA. §688.

I. SCOPE OF RULES—ONE FORM OF ACTION

Rule 1. Scope and Purpose of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1993, eff. Dec. 1, 1993.)

Supreme Court, U.S.
FILED
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No. 95-1219

In The

Supreme Court of the United States

October Term, 1995

GEORGE NEWMAN,

Petitioner,

vs.

CONSOLIDATION COAL COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. SHOULD THE THIRD CIRCUIT COURT OF APPEALS HAVE ISSUED A PETITION FOR WRIT OF MANDAMUS TO THE DISTRICT JUDGE REQUIRING HIM TO GRANT THE PETITIONER'S MOTION TO ADOPT THE FINDINGS OF THE JURY AS THE FINDINGS OF THE COURT WHERE SUCH ACTION WOULD DICTATE THE RESOLUTION OF FACTUAL FINDINGS COMMITTED TO THE DISTRICT JUDGE AND BE IN CONTRAVENTION OF THIS COURT'S PRIOR PRECEDENTS?

II. SHOULD THE THIRD CIRCUIT COURT OF APPEALS HAVE ISSUED A WRIT OF MANDAMUS TO THE DISTRICT JUDGE IN A LIMITATION OF LIABILITY ACTION DIRECTING HIM TO ADOPT THE JURY FINDINGS OF NEGLIGENCE AND UNSEAWORTHINESS FROM A SEPARATE ACTION IN STATE COURT AGAINST THE VESSEL OWNER AND IN FAVOR OF THE PETITIONER, WHERE THE PETITIONER HAD EXPRESSLY STIPULATED IN THE LIMITATION PROCEEDING AND IN ACCORDANCE WITH STANDARD ADMIRALTY PRACTICE THAT THE VESSEL OWNER COULD LITIGATE ALL ISSUES RELEVANT TO THAT PROCEEDING NOTWITHSTANDING ANY FINDING OR RULING IN THE STATE COURT ACTION?

RESPONDENT'S RULE 29.6 STATEMENT

There are no subsidiaries which are not wholly owned by Consolidation Coal Company. The following are parent companies of Consolidation Coal Company:

Rheinbraun US GmbH

Rheinbraun AG

RWE AG

DuPont Energy Company

E.I. du Pont de Nemours and Company

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APPENDIX

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Consolidation Coal Company ("Consolidation") respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the United States Court of Appeals for the Third Circuit's denial of Petitioner's petition to that court for Writ of Mandamus and dismissal of Petitioner's appeal entered on November 29, 1995 (Pet. a1-a2) at Nos. 95-3479 and 95-3491, respectively, and the Third Circuit's denial of Petitioner's Petition for Rehearing entered on December 27, 1995 at those same numbers (Pet. a3).

STATEMENT OF THE CASE

Petitioner, filed an action against Consolidation in the Court of Common Pleas of Allegheny County, Pennsylvania at No. G.D. 90-00980 ("state court action") in January 1990. In his Complaint, Petitioner sought recovery for personal injuries that he allegedly sustained while in the employ of Consolidation pursuant to the Jones Act, 46 U.S.C. § 688, and the doctrine of unseaworthiness under the general maritime law.

On July 20, 1990, Consolidation commenced the within action in the United States District Court for the Western District of Pennsylvania seeking exoneration from or limitation of its liability with respect to Petitioner's state court action under the provisions of the Limitation of Liability Act, 46 U.S.C. § 181 *et seq*. *See* Pet. a14, entries 1-5. At the time of filing its Complaint, Consolidation deposited with the district court a bond in the amount of $120,000, in accordance with 46 U.S.C. § 185, representing the value of Consolidation's interest in the M/V Elizabeth and Barge No. MC 1029, the vessels on which Petitioner claimed to have been working at the time of his accident.

Upon filing of Consolidation's Complaint and in order to protect the district court's admiralty jurisdiction over this matter, said court, through the Honorable Alan N. Bloch, entered an Order on July 20, 1990 (Appx. A) which, among other things, ordered on page 3 that the

> institution or further prosecution of any and all suits, actions, or legal proceedings against Consol or the M/V Elizabeth or Barge No. MC 1029, arising out of or connected with the

> aforesaid accident of April 27, 1989, except in this proceeding for exoneration from or limitation of liability be and the same hereby are stayed and enjoined.

By its application, Judge Bloch's order specifically enjoined any further prosecution of the state court action which Petitioner had previously filed.

After the parties had proceeded with discovery in the present action for approximately six months, Petitioner, on January 18, 1991, filed with the district court a Motion to Vacate or Dissolve Injunction and to Stay (Pet. a46), requesting that the district court lift the stay that it had ordered on July 20, 1990 so as to allow Petitioner to pursue his Jones Act and unseaworthiness claims in the state court action. In so requesting the lifting of the court's stay, Petitioner agreed to stipulate that (1) the district court had sole and exclusive jurisdiction of all issues relating to Consolidation's attempt to limit its liability in the present action; (2) that no state court judgment would be *res judicata* as to any limitation fact or issue in the present proceeding; and (3) that Petitioner's action would be confined to the state court proceeding. *See* Pet. a47, ¶ 8.

Citing established admiralty practice, Consolidation opposed the sought lifting of the stay in the present action, contending that the stipulations offered by Petitioner were insufficient to protect Consolidation's interests. *See* Appx. B.

Agreeing with Consolidation's opposition to Petitioner's Motion to Vacate, Judge Bloch ordered that the requested lifting of the stay would only be granted if

Petitioner agreed to enter into stipulations which the district court deemed would adequately protect Consolidation's interest in the present action. Pet. a8. On January 30, 1991, Petitioner acceded to the district court's condition and stipulated, *inter alia*, as follows:

> 1. The Claimants[1] waive any claim of *res judicata* based upon any judgment obtained in the state court proceeding.
>
> 2. Consolidation Coal Company shall have the right to litigate all issues relating to its claims of limitation and exoneration of liability in the present proceeding at the above caption.

Pet. a50. On February 1, 1991, the district court lifted the stay that it had imposed on July 20 of the previous year, allowing Petitioner to pursue his Jones Act and unseaworthiness claims in state court. However, Petitioner was prevented from entering or enforcing judgment in the state court action in view of the pending action for exoneration from or limitation of liability.
Pet. a10.

In November 1991, the state court action proceeded to trial and resulted in a jury verdict in favor of Petitioner in the amount of $1,327,000. The jury found that Consolidation was negligent under the Jones Act and that the

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[1] Originally, Petitioner's spouse had asserted claims in both the present proceeding and the state court action. Said claims have since been withdrawn.

vessel in question was unseaworthy. *See* Pet. a31. At the same time, the jury found that Petitioner was 11.83 percent contributorily negligent. After both parties' cross-motions for post-trial relief were denied, the trial court entered an order molding the jury verdict to a damage award in favor of Petitioner in the amount of $1,244,519.50.

Both parties took cross-appeals to the Pennsylvania Superior Court where the Superior Court affirmed all appealed issues except the trial court's award of prejudgment interest in favor of Petitioner. After the parties were denied cross-applications for reargument before the Superior Court, Cross-Petitions for allowance of appeal to the Pennsylvania Supreme Court were also denied. Petitioner petitioned this Court for Writ of Certiorari on the issues of prejudgment interest and contributory negligence at No. 95-240, which Petition was denied on October 10, 1995.

On June 15, 1995 Petitioner moved to have the present action returned to active status in the district court so that Consolidation's claims for exoneration from or limitation of liability may be litigated. He then filed a Motion to Adopt the Findings of the Jury as the Findings of the Court (Pet. a26) and Brief in Support urging that the district court adopt what he perceives to be the findings of the jury from the state court action. Consolidation filed a response opposing said Motion (Pet. a20, entry 45), and on August 4, 1995, Judge Bloch issued an order denying the Motion (Pet. a4).

On or about September 2, 1995 Petitioner filed with the Third Circuit Court of Appeals a Petition for Writ of Mandamus, docketed at No. 95-3479, and what he claims was a protective appeal with that same court on September

1, 1995, docketed at No. 95-3491, each challenging Judge Bloch's refusal to adopt the jury findings in the state court action as binding determinations in the limitation case. In so doing, Petitioner urged the Third Circuit to direct Judge Bloch to act in contravention of conditions to which Petitioner specifically stipulated and in disregard of established admiralty practice. The Third Circuit denied Petitioner's Petition for Writ of Mandamus for failure of "Petitioner to show a clear and indisputable right to the Writ[,]" and dismissed his appeal for lack of jurisdiction, on November 29, 1995. *See* Pet. p. a1-a2. Petitioner's Petition for Rehearing before that same court was denied on December 27, 1995.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Petition Should Be Denied Because it Requires Rulings on the Merits of this Case Which Are Committed to the Province of the District Judge as Fact Finder, Repudiation of Prior Rulings of the Court, and a Matter That Was Discretionary on the Part of the Third Circuit Court of Appeals.

With his Petition, Petitioner seeks to have Judge Bloch required to grant Petitioner's Motion to Adopt the Findings of the Jury as the Findings of the Court (Pet. a26). Such a ruling, according to Petitioner, would result in Judge Bloch taking the findings made by the jury in the state court action that Consolidation was negligent and that the leaving line in question or the vessel on which Petitioner worked was unseaworthy, as binding determinations of fact in the limitation action for the proposition that Consolidation had privity or knowledge of the condition giving rise to Petitioner's injury and that Consolidation "unreasonably failed to inspect the rope[.]" *See* Pet. a28, ¶ 6; a29, ¶ 18. With Judge Bloch's refusal to do so and the Third Circuit's refusal to direct otherwise, Petitioner maintains that further progression of the district court proceeding will result in a reexamination of the jury's findings in the state court action and a denial of a jury trial in this suit, both purportedly in violation of the Seventh Amendment to the United States Constitution.

In making his claims in this regard, Petitioner argues the merits of the exoneration and limitation proceeding[2] and in effect, presents his Motion to Adopt the Findings of the Jury as the Findings of the Court, initially presented to Judge Bloch, as if this Court is to decide the issue *de novo*. In fact, with a Petition for Writ of Mandamus, the Appeals Court is to review the action of the district court judge to whom the requested writ is to be directed. On certiorari, if granted, this Court is to review the decision of the Third Circuit Court of Appeals. In addition, in his Petition to this Court, Petitioner seeks to have firmly entrenched authority of this Court as set forth in cases of *Langnes v. Green*, 282 U.S. 531 (1931) and *Ex Parte Green*, 286 U.S. 437 (1932) "reexamined . . . and overruled." Pet. 19.

The Writ of Mandamus has been used only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Kerr v. United States District Court for the Northern District of California*, 426 U.S. 394, 402 (1976). In requesting that this Court instruct the Third Circuit Court of Appeals to grant his Petition for Writ of Mandamus and thereby require Judge Bloch to grant Petitioner's Motion to Adopt the Findings of the Jury as the Findings of the Court, Petitioner is seeking to impose a

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[2] *See e.g.*, Pet. 22 n.3, 27, 28. Petitioner's Motion to Adopt the Findings of the Jury as the Findings of the Court which serves as the basis for his Petition for Writ of Mandamus expressly states this. *See* Pet. a28 ("Consol's privity and knowledge, actual or constructive, have been found as facts by the jury at Consol's own request."); a29 ("The jury's finding that Consol unreasonably failed to inspect the rope involved precludes a contrary finding. Therefore, that fact is established for the purposes of this case.")

decision on the factual merits of the limitation proceedings. Such request is clearly beyond the appropriate use of mandamus.

Moreover, a showing of error on the part of the district court is not sufficient to justify the issuance of Writ of Mandamus. *See Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980). Petitioner not only claims error on the part of Judge Bloch, but also challenges the previous authority of this Court, on which Petitioner admits Judge Bloch's decision was based. Based on this contention, there is no challenge to Judge Bloch's "prescribed jurisdiction" or "exercise . . . [of] authority" in denying Petitioner's Motion. *Kerr*, 426 at 402. Indeed, the relief sought by Petitioner is not just a declaration of error on the part of Judge Bloch, which in and of itself, is insufficient grounds for the issuance of a Writ of Mandamus, *Allied Chemical*, 449 at 35; It is the outright overturning of previous authority of this Court. Such a request cannot be satisfied through the issuance of a Writ of Mandamus.

Finally, notwithstanding the potential existence of the elements necessary for the issuance of a Writ of Mandamus, whether or not to issue the Writ was committed to the sound discretion of the Third Circuit Court of Appeals. *La Buy v. Howes Leather Company*, 352 U.S. 249, 260 (1957); *Schlagenhauf v. Holder*, 379 U.S. 104, 111 n. 8 (1964).

Because Petitioner's Petition for Certiorari involved rulings on the merits in the instant proceeding, which are committed to the authority of the district judge, because Petitioners sought relief asks for this Court to repudiate its prior rulings, and because the issuance of the Writ of Mandamus was discretionary on the part of the Third Circuit

Court of Appeals in the first instance, the Petition should be denied.

II. The Third Circuit Court of Appeals Did Not Err In Denying Petitioner's Petition for Writ of Mandamus.

A. Petitioner cannot satisfy the extremely stringent standard for the issuance of Writ of Manamus.

It is well-settled that a writ of mandamus is reserved for the most extraordinary situations and the use of this "drastic" remedy is carefully circumscribed. *Allied Chemical,* 449 U.S. at 34. An essential condition for the granting of such a relief exists where the petitioner's right to the issuance of a writ is "clear and indisputable." *Will v. United States*, 389 U.S. 90, 96 (1967). While this Court has held that the right to a jury trial where equitable claims are asserted simultaneously with legal claims may justify a writ of mandamus, *see Beacon Theater, Inc. v. Westover*, 359 U.S. 500 (1959), appellate courts have repeatedly held that the "clear and indisputable" criterion is still essential to the granting of a petition for writ of mandamus where denial of the right to a jury trial is asserted. *See Traveler's Int'l A.G. v. Robinson*, 982 F.2d 96, (3d. Cir. 1992); *see also, In Re: Pasquariello*, 16 F.3d 525 (3d Cir. 1994). Moreover, where there exists ambiguity as to whether the petitioner is entitled to a jury trial, and such ambiguity must be resolved in favor of the petitioner to award the request for relief, the Third Circuit has held that the petitioner has not shown a clear and indisputable right and therefore a writ of mandamus should not issue. *Pasquariello*, 16 F.3d at 531. Even where a claim for the writ of mandamus is colorable, it is within the

discretion of the Appeals Court to determine whether the writ should issue. *Kerr*, 426 U.S. at 403.

As set forth below, there is entirely no legal basis supporting Petitioner's claim that the Third Circuit should have issued a writ of mandamus directed to Judge Bloch. However, irrespective of whether this Court should conclude that Petitioner's arguments are meritorious, which is denied, there can be no conclusion that in view of the following that Petitioner's right to the relief that he seeks is "clear and indisputable." Accordingly, the Petition should be denied.

B. Petitioner is bound by his Stipulation that all issues relevant to exoneration or limitation would be litigated in this action.

Petitioner expressly stipulated that the district court would have exclusive jurisdiction for determining all issues related to Consolidation's Complaint for Exoneration From or Limitation of Liability and that no fact found by a jury in the state court action would serve as *res judicata* in the present case. Pet. a50. Apparently mindful of the stipulation that he entered into, Petitioner attempted to circumvent the conditions therein by denominating his Motion presented to Judge Bloch as to one to "Adopt the Findings of the Jury as the Findings of the Court." However, Petitioner's use of this specious terminology in order to assert *res judicata* was recognized by Judge Bloch as being patently transparent and in complete contravention of the stipulation.

Petitioner seeks to cavalierly jettison his stipulation on which Judge Bloch and Consolidation relied in allowing and

agreeing to have the state court action proceed. The stipulation arises from established admiralty practice and cannot be so lightly regarded. First, that the district court, as a federal court sitting in admiralty in an exoneration/ limitation action, has jurisdiction in the present action cannot be gainsaid. It is not coincidence or serendipity which creates jurisdiction in the district court. Instead, it is the fact that Consolidation filed a Complaint for Exoneration from or Limitation of Liability which can be filed only in a federal court and can be heard only pursuant to said court's admiralty jurisdiction. *See Langnes*, 282 U.S. at 540. Appeals courts have consistently held that such in proceedings "the district court, sitting in admiralty without a jury, determines 'whether there was negligence; if there was negligence, whether it was without privity or knowledge of the owner; and if limitation is granted, how the [limitation] fund should be distributed.'" *Gorman v. Cerasia,* 2 F.3d 519, 524 (3d Cir. 1993), *quoting In re* Complaint of *Dammers & Vanderheide & Sheepvaart Maats Christina B.V.*, 836 F.2d 750, 755 (2d Cir. 1988) (emphasis added).

Petitioner's stipulation was required by well-established admiralty practice and not the result of a mere whim of the parties. Specifically, courts sitting in admiralty had historically struggled with reconciling the interests underlying such claims as Jones Act negligence which, by statute, may be tried before a jury, and protecting the interests of the vessel owner who has filed a complaint for exoneration from or limitation of liability. *See Gorman* 2 F.3d at 523-24 (3d Cir. 1993). Indeed, in the latter situation, "[t]he court's primary concern is to protect the shipowner's absolute right to claim the [Limitation] Act's liability cap and to reserve the adjudication of that right in the federal forum." *Magnolia Marine Transport Company,*

Inc. v. LaPlace Towing Corp., 964 F.2d 1571, 1575 (5th Cir. 1992) *citing Langnes*, 282 U.S. at 543.

In order to reconcile the conflicts in the interests between a party's right to pursue his claims in the forum of his choice pursuant to this "saving to suitors" clause of 28 U.S.C. § 1333 which preserves the right to a trial by jury for certain claims, as against the admiralty court's exclusive jurisdiction over exoneration and limitation claims and responsibility of insuring the vessel owner's protection under that statute, courts, beginning with this Court, have ruled that in cases such as the present action,

> when a single claimant brings an action against each shipowner seeking damages in excess of the value of the vessel [, . . .] the district court must lift this stay provided that the claimant stipulates that the admiralty court has exclusive jurisdiction to determine all issues concerning the owner's limitation of liability under the [Limitation] Act.

Gorman, 2 F.3d at 524, *citing, inter alia*, *Ex Parte Green*, 286 U.S. at 438-40 (1932) and *Langnes*, 282 at 540-44.

In implementing these procedures admiralty courts for the past 60 years have developed--and required claimants to enter into--stipulations which protect the vessel owner's rights and thus permit the admiralty court to lift the stay created with the limitation proceeding. Such stipulations include the waiver of any claim of *res judicata* relevant to the issue of limited liability based on any judgment obtained in the state court, and concession of the shipowner's right to litigate all issues relating to limitation in the federal

limitation proceeding. *Gorman*, 2 F.3d at 524-25 citing Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* § 10-19, at 871 (2d ed. 1975).

The stipulation on which Petitioner now seeks to renege was entered into voluntarily and arose effectively at his request. Specifically, Petitioner sought to have the July 20, 1990 injunction imposed by the district court lifted so that he could pursue the state court action. (Pet. a46). The district court was, at that point, duty-bound to effectuate its "primary concern" of preserving Consolidation's right to the incidents of the Limitation Act. *See Magnolia Marine*, 964 F.2d at 1575. Failure of the district court to impose sufficiently restrictive conditions preserving Consolidation's rights would have constituted an abuse of discretion. *See Gorman*, 2 F.3d at 523. At the same time, had Petitioner not entered into a stipulation sufficient to protect Consolidation's rights, the district court would have been bound to continue enjoining the state court action and try the entire case without a jury. *See, Ex Parte Green*, 286 U.S. at 440; *see also, Complaint of Port Arthur Towing*, 42 F.3d at 316-317.

Accordingly, in order to pursue his state court action, admiralty practice required Petitioner to agree to have disregarded the findings of the jury in the state court action for purposes of the issues in the present case. While Petitioner bemoans the fact the issues of the present action must be litigated *ab initio*, he stipulated to this result and undoubtedly recognized the consequences of his request to have the stay in this case lifted. As noted by the Fifth Circuit Court of Appeals:

> So where, as here, all of the claimants are so anxious to take advantage of the perceived magnanimity of South Texas [state court] juries that they are willing to stipulate essentially that they will submit to two trials -- the state court trial followed by a substantially redundant federal limitation proceeding -- this court is hard put to deny them. We must accede to this choice if it is accompanied by stipulations fully protecting Odeco's [the vessels owner's] right to limit liability and agreeing to abide by an admiralty court determination of the right to limit.

Odeco Oil & Gas Company v. Bonnette, 4 F.3d 401, 404-405 (5th Cir. 1993) (emphasis added in part).

The established procedure with regard to exoneration or limitation proceedings and related state court actions recognizes the potential for identical issues to be raised in both forums and seeks to insure that, to the extent those questions are addressed in any state court proceeding, the complainant in the exoneration or limitation action has the express right to litigate the relevant issues raised in the admiralty court. The Third Circuit Court of Appeals recently reaffirmed this notion:

> We agree with these courts that the potential overlap between the factual questions raised in the limitation proceeding (whether the maritime mishap occurred "without privity or knowledge" of the shipowner) and those to be litigated in the state tort action (whether the shipowner acted unreasonably) requires that a

> claimant seeking to vacate the stay concede both the district court's exclusive jurisdiction to decide all limitation issues and expressly agree to waive any "claim of *res judicata* relevant to the issue of limited liability based on any judgment obtained in the state court." [Gilmore & Black, *The Law of Admiralty*, § 10-19, at 871.] It is clear that the relevant waiver discussed is that of issue preclusion, notwithstanding the reference in the cases to "*res judicata*".

Gorman, 2 F.3d at 528-29.

Petitioner devoted considerable discussion in his arguments to the district court and Third Circuit, and does so now in his Petition, to his contention that the factual findings of the jury in the state court action preclude any success in the limitation proceeding and suggests that should the district court not be required to adopt those jury findings as its own, then any factual findings of the district court in the limitation action, presumably in favor of Consolidation, would be inconsistent with that of the state court jury, and therefore prohibited by the Seventh Amendment to the United States Constitution. In this regard, Petitioner is incorrect both legally and factually in his contentions. First, notwithstanding his stipulation that any factual finding in the state court action would not serve as *res judicata* in the limitation case, and that Consolidation retained all rights to have the district court decide issues in the limitation proceeding (*see* Pet. a50), the factual findings of a jury may, under no circumstances, be utilized by an admiralty court in an exoneration and limitation proceeding.

Although Petitioner urges contrariwise, the cases that he cites in support involve either maintenance and cure claims appended to other maritime claims which may be heard by a jury, or single cases in which equitable and legal issues are raised; in all such cases the court had the jury and non-jury issues before it. *See* Pet. 16, 19. Significantly, Petitioner cites no authority in which the factual findings of a jury in a state court action were utilized in determining relevant factual issues in an exoneration or limitation proceeding. Indeed, "[t]here is no right to a jury in actions instituted in admiralty[.]" *Dammers & Vanderheide,* 836 F.2d at 754, *citing Waring v. Clarke*, 46 U.S. (5 How.) 441, 458-60 (1847).

Controlling rules of admiralty law are left primarily for the United States Supreme Court. *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20 (1963). In the development of those rules with regard to exoneration and limitation proceedings, this Court has not authorized the application of jury findings in an exoneration or limitation proceeding. Accordingly, the district court should not be required to utilize the factual findings of the jury in the state court action with regard to the present case.

C. Jury findings may not be used in resolving limitation or exoneration issues.

1. Limitation of Liability.

Under the guise of claiming denial of a jury trial, Petitioner seeks to have the findings of negligence and unseaworthiness made by the jury in the state court action adopted by the District Court which Petitioner claims would

be dispositive of the "privity or knowledge" issue in the limitation proceeding. *See* Pet. a26. With regard to the limitation aspect of the present action, the findings of the jury in the state court action have no bearing on the determination of whether Consolidation had "privity or knowledge" of the condition giving rise to Petitioner's injuries. As noted in the special interrogatories returned by the jury in the state court proceeding (Pet. a31), Consolidation was found to be negligent under the Jones Act and was found to have provided an unseaworthy vessel or vessels which proximately caused Petitioner's injuries. Such findings, however, are prerequisites to the focal issue in a limitation action; *i.e.*, whether a managing officer of the vessel owner had privity or knowledge of the condition which caused the claimant's injuries. *See Coryell v. Phipps*, 317 U.S. 406, 410-412 (1943). In fact, no such finding was made by the jury in the state court action.

Petitioner's argument that Consolidation should be bound in the limitation proceeding by the finding of the jury because it submitted issues with regard to its knowledge to the jury is *non sequitur*. First, a vessel owner's knowledge for purposes of a determination of Jones Act negligence, as contrasted with privity or knowledge of managing officers of the vessel owner for purposes of limitation of liability, are two completely separate determinations, the latter of which to be made only by the admiralty court in the limitation case. While Petitioner contends that the finding of negligence in a state court action automatically translates to privity or

knowledge with regard to the limitation proceeding, such is not the case.[3]

Assuming, *arguendo*, that the factual findings of the district court may potentially conflict with those of the jury in the state court action, the district court should nevertheless be permitted to undertake its own review of the evidence presented in this case. By way of example, in the Ninth Circuit decision in *Port of Pasco v. Pacific Inland Navigation Company*, 324 F.2d 593 (9th Cir. 1963), following an explosion which damaged the dock of the claimant, the claimant initiated an action in state court in the State of Washington. Thereafter, the owner of the vessel on which the explosion occurred filed an action for limitation of liability in the United States District Court for the Eastern District of Washington. As in the present action, the parties

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[3] In support of his position, Petitioner cites *Gorman v. Cerasia*, for the proposition that "the factual findings of the state court jury would apply in the ensuing limitation case in federal court...." Pet. p.25. In fact, the Third Circuit did not state that the issue of privity or knowledge should not be litigated in the admiralty court and decided *de novo* therein.

The existence of Jones Act negligence and whether the vessel owner had privity or knowledge of the condition which caused Petitioner's injuries are two completely different issues. Most importantly, the Third Circuit's comment was made in an action involving a small pleasure craft owned and operated by the same individual, and was based on the holding in *In Re M/V Sunshine II*, 808 F.2d 762, 765 (11th Cir. 1987) which involved a similar situation--a situation not present here with an industrial barge and tugboat owned by a large corporation with many layers of employees, supervisors and managers. The alleged negligence of one or more of these classifications of employees for purposes of limitations privity or knowledge can not be equated with the acts of an owner/operator of a pleasure craft.

stipulated that the stay issued by the admiralty court with regard to the state court action would be lifted, and the claimant could pursue the state court action; however, the parties reserved to the admiralty court the right to adjudicate the complainant's right to limit its liability.

In the state court proceeding, the Superior Court of the State of Washington found that the management of the defendant vessel owner was negligent and knew or should have known of the conditions and omissions which caused the explosion. *Id.* at 596-97 U.S.

Despite this specific finding implicating the privity or knowledge of the complainant vessel owner, the admiralty court, affirmed by the Ninth Circuit Court of Appeals, found in direct contravention of the holding of the state court, thus permitting the vessel owner to limit its liability. The Ninth Circuit Court of Appeals countenanced this inconsistency based on admiralty practice and the role of the admiralty court in the limitation proceeding:

> [T]he question of limitation of liability was reserved for determination by the district court. It follows that the latter court was free to make its own findings and conclusions with regard to whether supervisory personnel were negligent in such manner as to constitute privity and knowledge within the meaning of § 183(a). If this freedom of action left to the district court means anything, it means that the district court was at liberty to make findings and conclusions which might be expressly or implicitly inconsistent with those made by the state court as a basis for the latter's decision on liability.

Id. at 598 (emphasis added). While the parties had stipulated that the finding of the state court would be binding upon them for purposes of liability and damages,[4] the Court held that such a stipulation did not extend to the limitation proceeding. *Id.* at 599.

Petitioner contends that any finding of fact made by the admiralty court in the present action inconsistent with a finding by the jury in the state court proceeding would contravene the Seventh Amendment to the United States Constitution. However, to the extent inconsistent findings would result (which is not necessarily the case) they would be found in the context of separate issues, *i.e.*, negligence/ unseaworthiness versus privity or knowledge of a vessel owner. More importantly, Petitioner expressly stipulated that the admiralty court would have exclusive jurisdiction to determine the issues relating to exoneration from or limitation of liability in this case irrespective of the factual findings in the state court proceeding. *See* Pet. a50. As noted in the *Port of Pasco* decision, inconsistencies in a state court and admiralty action are inherent in the admiralty procedure providing for a state court action to go forward independently of the limitation proceeding. *See Port of Pasco*, 324 F.2d at 599; *see also*, *Complaint of Great Lakes Dredge & Dock Company*, 1995 WL318807 (N.D.Ill.) *4. ("The potential for non-uniform results arising from separate proceedings is an inherent part of admiralty practice and is specifically contemplated under the Limitation Act.")

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[4] A similar stipulation was not made in the present action.

2. Exoneration from Liability.

The foregoing considerations are significant not only for the limitation component of this action, but also by virtue of the fact that Consolidation, in the present action, has claimed the right to exonerate itself completely from liability, as well as its right to limit its liability to the value of the vessels involved in the Petitioner's accident. As such, Consolidation may litigate not only whether it had privity or knowledge of the condition which caused Petitioner's injuries, but also whether it has any liability for Petitioner's injuries:

> [I]n a suit seeking exoneration from, and alternatively limitation of, liability under the Act, the limitation court must initially address exoneration from liability inasmuch as, in the event no liability is found, there is nothing to limit.

In Re Matter of Texaco, Inc., 847 F.Supp. 457, 459 (E.D.La. 1994), *rev'd on other grounds*, *Texaco, Inc. v. Williams*, 47 F.3d 765 (5th Cir. 1995).

In *Texaco, Inc. v. Williams*, the United States District Court for the Eastern District of Louisiana denied the claimants' motion to have the stay imposed on their state court damage claims despite the claimants' proffered stipulation to have issues regarding limitation of liability litigated in the admiralty court on the basis that the vessel owner had sought both exoneration from and limitation of liability in that court. In recognizing the denial of the claimants' right to jury trials in those state court actions, the district court noted the preference that must be given to the vessel owner in the

exoneration and limitation action and that stipulations providing that the admiralty court could litigate issues with regard to limitation were insufficient to adequately protect the vessel owner's interests. *See generally, In Re Matter of Texaco , Inc.*, 847 F.Supp. at 459-462. Although the district court was reversed on appeal, the Fifth Circuit did so only after the claimants had stipulated that the admiralty court would not be "bound by any decisions by other courts on issues relating to limitation and exoneration." *Texaco, Inc.*, 47 F.3d at 769 (emphasis in original).

Similar considerations underlie the Petitioner's stipulation in the present action. While Petitioner initially offered to stipulate that the admiralty court would have "exclusive jurisdiction of any and all issues relating to Consolidation's attempt to limit its liability . . . [and] that no state court judgment will be *res judicata* as to any limitation fact or issue in the limitation proceeding[,]" (Pet. a46-a47, ¶ 8) (emphasis added), Consolidation opposed the Petitioner's Motion to Lift the Stay on the state court proceeding on the basis that the proffered stipulation inadequately protected Consolidation's interests with regard to its claims for exoneration. *See* Appx. B. pp. 10a-12a. Based on this dispute, the district court ordered that it would lift the stay prohibiting the prosecution of the state court action only if Petitioner stipulated that Consolidation would "have the right to litigate all issues relating to its claims of limitation and exoneration of liability in the present proceeding[.]" (Pet. a9) (emphasis added).

Three days following the entry of this order, Petitioner acceded to the requirements for the Stay to be lifted, without objection or opposition. Specifically, Petitioner stipulated that "Consolidation Coal Company shall

have the right to litigate all issues relating to its claims of limitation and exoneration of liability in the present proceeding at the above caption." (Pet. a50) (emphasis added). Based on this Stipulation, Judge Bloch lifted the Stay and permitted Petitioner to pursue the state court action. (Pet. a10).

Had Petitioner not entered into the forgoing Stipulation, his claims necessarily would have been litigated in the present action. *See Ex Parte Green,* 286 U.S. at 440. By virtue of the Stipulation, however, Consolidation retained its right to litigate all issues with regard to exoneration or limitation, without Petitioner raising any factual issue decided in the state court action as *res judicata* in this case. Again, despite Petitioner's urging this Court to direct that Judge Bloch adopt the findings of the jury in the state court action, the clear effect of this request is to impose *res judicata* and collateral estoppel against Consolidation, both of which Petitioner stipulated not to do, and which settled admiralty practice prohibits.

D. Petitioner waived any rights to having the jury findings employed for any aspect of limitation proceeding.

Assuming, *arguendo*, that violation of Petitioner's Seventh Amendment rights are an issue, by entering into the Stipulation of January 30, 1991, Petitioner waived any protection which would otherwise be afforded by the Seventh Amendment. It is well established that constitutional rights may be waived if the waiver is voluntary, knowing, and intelligent. *Faretta v. California*, 422 U.S. 806, 835 (1975). Whether the waiver was voluntary, knowing, and intelligent

is to be determined from the facts and circumstances of a particular case. *Edwards v. Arizona*, 451 U.S. 457, 482 (1981). It cannot be doubted that Petitioner's Stipulation of January 30, 1991 constituted a sufficient and binding waiver of any right that he may have had against a court's reexamination of jury findings. Specifically, it was Petitioner who moved in the district court to have the stay of the state court proceeding lifted, and who stipulated that he would waive any claim of *res judicata* in the state court proceeding, and that Consolidation would have the right to litigate "all issues" relating to the limitation and exoneration proceeding.

The issue of the necessity for and content of stipulations required for the admiralty court to lift the stay on the state court action was specifically presented and disputed in detail before the district court, prior to Petitioner entering into the Stipulation. *See* Pet. a46, Appx. B, Pet. a8, a50 and a10. Significantly, Petitioner never raised any Seventh Amendment issue, did not challenge the stipulation that the district court deemed necessary to permit the state court action to proceed, and voluntarily entered into that stipulation.

Had Petitioner felt the stipulation required by the court was objectionable, he certainly should have challenged it then.[5] Significantly, however, Petitioner raised no objection

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[5] Petitioner is obviously well familiar with the opportunities for appealing an interlocutory order--witness Petitioner's appeal to the Third Circuit at Docket No. 92-3734 concerning the district court's November 20, 1992 order prohibiting execution on the judgment in the state court action (Pet. a18, entries "w/35" and 37). In particular, Petitioner is obviously familiar with the mechanism to seek appellate relief for the

at that time. It is only now, after he has been awarded a jury verdict on his claims of unseaworthiness and Jones Act negligence in the state court action that Petitioner seeks to renege on his Stipulation and asks this Court to direct what he was expressly forbidden to do, and what he expressly agreed not to do. Petitioner's assertion of Seventh Amendment issues, after having previously waived them, cannot now be asserted simply because it suits his fancy. *See Carter v. Sea Land Services, Inc.*, 816 F.2d 1018, 1021 (5th Cir. 1987) *citing Schnecktoth v. Bustamonte*, 412 U.S. 218 (1973) ("Once a right, even a fundamental right, is knowingly and voluntarily waived, a party has no constitutional right to recant at will.")[6]

Petitioner appears to equate the district court's intention to preside over a bench trial on all issues relating to Consolidation's Complaint for Exoneration From Or Limitation of Liability as a deprivation of his jury trial rights under the Seventh Amendment to the Constitution. To cure this purported deprivation, Petitioner wishes to have the district court ordered to adopt findings of the jury in the state court action. However, not only is the procedure that the district court intends to follow accepted in admiralty

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purported denial of rights to a jury trial. *See* Petition for Writ of Mandamus and Petitioner's appeal of September 1, 1995 from the district court's August 4, 1995 order.

[6] Similarly, by entering into the January 30, 1990 Stipulation, Petitioner consented to having any jury findings within the state court action which may be relevant in the within proceeding "reexamined". *See Withrow v. Cornwell*, 845 F.Supp. 784, 785 (D.Kansas 1994), *citing Dimick v. Schiedt*, 293 U.S. 474 (1935) (Additur imposed by court, with consent of both parties, does not violate Seventh Amendment proscription on reexamination of jury findings).

practice, but Petitioner expressly agreed to it through his stipulation of February 1, 1991 (Pet. a50). Swiftly backpedaling from his stipulation, Petitioner now states that he did not agree to have the district court make factual findings relevant to issues of exoneration and limitation in the limitation proceeding notwithstanding the fact that they may be inconsistent with findings of the jury in the state court action. Pet. 22-23.

The stipulation could not be more clear. When Petitioner stated that he would "waive any claim of *res judicata* based upon any judgment obtained in the state court proceeding[,]" Pet. a50 (emphasis added), what was Petitioner waiving other than the potential claim that certain facts which may be relevant in the exoneration or limitation proceeding already been adjudicated in the state court action by a jury and were thus binding in the present action?

When Petitioner agreed in his stipulation that Consolidation would "have the right to litigate all issues relating to its claims of limitation or exoneration of liability" in the limitation proceeding (Pet. 29a) (emphasis added), what else was he agreeing to but to be subject to a bench trial on the merits of Consolidation's exoneration and limitation claims? The court, in permitting the state court action to proceed, and Consolidation, in not opposing that ruling, relied on Petitioner's stipulation in these regards.[7] It

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[7] As stated by the district court in its August 4, 1995 order:

> Claimant's attempt to have this Court adopt the state court jury's findings for purposes of the limitation proceeding is directly contrary to his own stipulation. In addition, in light of the stipulation, the claimant

is significant that Judge Bloch--who required the stipulation, presided over the parties' dispute over its wording, and lifted the stay on the state court action, so interprets the effect of the stipulation.

Accordingly, Petitioner's contentions concerning violations of the Seventh Amendment, to the extent any such issues are implicated, have been voluntarily waived.

E. Petitioner is not entitled to a jury trial *de novo* in the limitation proceeding.

Petitioner lastly urges that should this Court not instruct Judge Bloch to adopt the findings of the jury in the state court proceeding, that it nonetheless direct that the district court order a jury trial *de novo*. Petitioner completely disregards the fact that complaints for exoneration from and/or limitation of liability do not give rise to a jury trial. *Gorman*, 2 F.3d at 524; *Dammers & Vanderheide*, 836 F.2d at 755.

Petitioner attempts to contort the limitation proceeding, and thus deprive the incidents that Consolidation is entitled to under it by incorporating a jury into the procedure so as to make factual determinations. As noted previously, there is no such provision in the admiralty

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cannot argue that the complainant waived its right to litigate the limitation issues by proceeding in state court; the complainant undoubtedly relied on the claimant's stipulation when it agreed to litigate in a different forum. [Pet. a7.]

procedure to do such. Significantly, Petitioner cites no authority for a jury to decide factual issues in a limitation proceeding, where as here, the district court did not have an independent jurisdictional basis for the claims of the Petitioner.

Since Consolidation brought this action as a limitation proceeding, Petitioner is not entitled to a jury trial, and therefore, Petitioner's request that this Court order such should be denied.

CONCLUSION

Accepted admiralty practice vindicates Judge Bloch's refusal to adopt the findings of the jury in the state court proceeding for purposes of the issues in this limitation action. Petitioner voluntarily agreed not to do what he is asking this Court to do presently. In reliance on that stipulation, the district court and Consolidation agreed to allow the state court action to proceed. To the extent any rights of Petitioner's will be denied by the limitation action proceeding, Petitioner has expressly waived those rights.

Even if Petitioner's arguments to this Court are accepted, Petitioner has not established a clear and indisputable right to relief. At best there is ambiguity as to whether Petitioner is entitled to invoke the jury findings of the state court proceeding or whether Petitioner is entitled to a jury trial in the present action, which ambiguity precludes the establishment of a clear and indisputable right to have the writ of mandamus issued.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA DATED JULY 20, 1990

Civil Action No. 90-1206

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

COMPLAINT OF CONSOLIDATION COAL COMPANY, as Owner of the MOTOR VESSEL ELIZABETH and as Charterer of BARGE NUMBER MC 1029, FOR EXONERATION FROM OR LIMITATION OF LIABILITY

ORDER

AND NOW, this 20th day of July, 1990, upon consideration of Consolidation Coal Company's ("Consol") Motion for Approval of Limitation Bond and Stipulation for Costs and for an Order Directing Issuance of the Required Notice and for Issuance of an Injunction with respect to any and all losses, damages, or injuries occasioned or incurred by any person or resulting from an alleged accident involving George Newman, which occurred on or about April 27, 1989 while he was employed by Consol, and referred to in Consol's Complaint for Exoneration From or Limitation of Liability filed herein, and it appearing to the Court that (1) the combined value of Consol's interest in the towboat M/V Elizabeth and Barge No. MC 1029 and their freight then pending was approximately $120,000.00, (2) the claims which have been or may be asserted against Consol may exceed the value of its interest in said towboat and barge and the freight then pending, and (3) Consol filed a Limitation Bond in the amount of $120,000.00 plus interest and has further filed a Stipulation for Costs in the amount of $250.00, IT IS HEREBY ORDERED that the Limitation Bond is approved; however, such

approval is without prejudice to the due appraisal of Consol's interest in said towboat M/V Elizabeth and Barge No. MC 1029 and their freight then pending, if so Ordered, and that in the meantime, any party may apply to have the amount of the Limitation Bond increased or diminished as the Court may direct.

IT IS FURTHER HEREBY ORDERED that a notice in the form attached hereto as Exhibit "A" shall issue out of and under the seal of this Court, citing all persons, firms, and corporations who have or allege to have claims for any and all losses, damages, or injuries occasioned or arising out of the alleged accident involving George Newman which occurred on or about April 27, 1989, to file their respective claims with the Clerk of this Court or be forever barred, and to serve copies of said claims on Consol's attorneys, Thomas A. Smock, Esquire and Leonard Fornella, Esquire, on or before September 15, 1990, and to make due proof of their claims as this Court may hereafter direct, subject to the right of any such persons or concerns to controvert or question said claims, with liberty also to such claimants who have duly filed claims to answer the Complaint filed herein by filing an Answer with the Clerk of this Court on or before September 15, 1990.

IT IS FURTHER HEREBY ORDERED that pursuant to Local Admiralty Rule (g)(3), the aforesaid public notice shall be given by publication thereof in the Pittsburgh Press, published in Pittsburgh, Pennsylvania, and that such notice shall be published once a week for four successive weeks prior to the date fixed herein for filing claims.

IT IS FURTHER HEREBY ORDERED that not later than the date of the second publication, Consol shall mail or cause

copies of said notice to be mailed to every person or concern known to have made any claim against them or against the towboat M/V Elizabeth or Barge No. MC 1029, arising out of or connected with the aforesaid accident which allegedly occurred on on or about April 27, 1989.

IT IS FURTHER HEREBY ORDERED that the institution or further prosecution of any and all suits, actions, or legal proceedings against Consol or the towboat M/V Elizabeth or Barge No. MC 1029, arising out of or connected with the aforesaid accident of April 27, 1989, except in this proceeding for exoneration from or limitation of liability, be and the same hereby are stayed and enjoined.

IT IS FURTHER HEREBY ORDERED that service of this Order shall be made by Consol or its designee.

s/ Alan N. Bloch
UNITED STATES DISTRICT JUDGE

APPENDIX B — RESPONSE TO CLAIMANTS' MOTION TO VACATE OR TO DISSOLVE INJUNCTION AND TO STAY AND SUPPORTING MEMORANDUM OF LAW

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 90-1206

COMPLAINT OF CONSOLIDATION COAL COMPANY, as OWNER of the MOTOR VESSEL ELIZABETH and as Charterer of BARGE NUMBER MC 1029, FOR EXONERATION FROM OR LIMITATION OF LIABILITY.

RESPONSE TO CLAIMANTS' MOTION TO VACATE OR TO DISSOLVE INJUNCTION AND TO STAY AND SUPPORTING MEMORANDUM OF LAW

AND NOW comes Complainant, Consolidation Coal Company (hereinafter "Consol") by and through its undersigned counsel, and hereby responds to the motion of Claimants, George Newman and Suzanne M. Newman, to vacate or dissolve injunction and to stay this proceeding, averring as follows:

RESPONSE TO MOTION

1. With respect to the averments contained in paragraph 1 of Claimants' motion, it is admitted that Claimants have filed a Complaint against Consol in the Court of Common Pleas of Allegheny County, Pennsylvania (hereinafter "state court suit"), seeking to recover damages under the Jones Act, 46 U.S.C. Section 688, and also alleging the unseaworthiness of vessels. It is also admitted that Claimants have also filed a formal claim in this proceeding on the same bases. However, it is denied that Claimants have asserted any affirmative claim for recovery

based on negligence under Section 5(b) of the Longshoremen and Harborworker's Compensation Act, 33 U.S.C. 905(b) in their the state court suit, although such a formal claim has ostensibly been made by Claimants in this proceeding.

2. With respect to the averments contained in paragraph 2 of Claimants' motion, it is admitted that Mr. Newman was involved in an accident on or about April 27, 1989 while employed by Consol. The remaining averments contained in paragraph 2 of Claimants' motion are denied as stated.

3. With respect to the averments contained in paragraph 3 of Claimants' motion, it is admitted that Claimants have filed suit against Consol in the Court of Common Pleas of Allegheny County, Pennsylvania at No. GD 90-00980, which was served upon Consol on January 26, 1990. Consol is without knowledge or information sufficient to form a belief as to the truth of Claimants' averment as to the date on which said suit was filed, and thus said averment is denied.

4. The averments contained in paragraph 4 of Claimants' motion are denied as stated. On July 20, 1990, Consol filed the instant action seeking both exoneration from or limitation of liability. It is admitted that on July 20, 1990, this Court entered an Order in this action. However, the terms of that Order speak for themselves, and thus no response to required.

5. With respect to the averments contained in paragraph 5 of Claimants' motion, Consol avers that the terms of this Court's Order of July 20, 1990 speak for themselves, and thus no response to Claimants' attempt to paraphrase said Order is required.

Appendix B

6. With respect to the averments contained in paragraph 6 of Claimants' motion, it is admitted that Consol duly and timely published, served and/or filed all advertisements, notices, proofs and other documents or pleadings required by the statutes, orders, rules and/or regulations applicable to this action.

7. The averments contained in paragraph 7 of Claimants' motion are admitted in part and denied in part. It is admitted that no claimants other than the Newmans have filed formal claims in this action. However, it is denied that Mrs. Newman has any legally cognizable claim for derivative consortium rights.

8. Consol avers that no response is required to the averments contained in paragraph 8 of Claimants' motion.

9. Consol avers that no response is required to the averments contained in paragraph 9 of Claimants' motion. In the event a response is deemed to be required, then Consol avers that it will be prejudiced by the granting of this motion if all required stipulations are not made by Claimants. Consol further denies that, if Claimants win a judgment in their state court suit less than the limitation fund, this Court will not be required to take any further action, since Consol's action herein is not only for limitation but also for exoneration from liability, and further action may be necessary on the exoneration claim.

10. Consol avers that no response is required to the averments contained in paragraph 10 of Claimants' motion.

11. The averments contained in paragraph 11 of Claimants' motion are denied as stated.

Appendix B

MEMORANDUM OF LAW IN RESPONSE TO CLAIMANTS' MOTION

Claimants' motion to vacate or dissolve injunction and to stay is actually two motions, and Consol will hereinafter discuss the relative merits of these motions separately.

Claimants filed an action against Consol in the Court of Common Pleas of Allegheny County, Pennsylvania at No. GD 90-00980 (state court suit), which was served on Consol on January 26, 1990. Claimants allege in their state court suit that George Newman was a seaman and that he was injured after being involved in an accident on or about April 27, 1989 while employed by Consol.

On July 20, 1990, Consol filed the instant action seeking exoneration from or limitation of liability with respect to Mr. Newman's accident of April 27, 1989, pursuant to the provisions of 46 U.S.C. Sections 181, et seq. At that time, Consol also filed an appropriate Limitation Bond in the amount of $120,000.00, representing the aggregate value of Consol's interests in the M/V Elizabeth and Barge No. MC 1029, the vessels on which Mr. Newman claims to have been working at the time of his accident.

Upon the filing of Consol's Complaint herein, and in order to properly protect this Court's admiralty jurisdiction over this matter, this Court entered an Order on July 20, 1990 which, among other things, ordered on page 3 that the

> institution or further prosecution of any and all suits, actions, or legal proceedings against Consol or the M/V Elizabeth or Barge No. MC 1029, arising out of or connected with the

> aforesaid accident of April 27, 1989, except in this proceeding for exoneration from or limitation of liability, be and the same hereby are stayed and enjoined.

Thus, this Court's Order of July 20, 1990 effectively enjoined any further prosecution of the state court suit which Claimants had filed previously.

Consol subsequently published all required notices and advertisements, and filed all required pleadings and proofs in accordance with the applicable statutes, orders, rules and regulations governing actions for exoneration from or limitation of liability. Thereafter, the only claim filed in this proceeding was one filed on behalf of the Newmans, Claimants herein. Claimants now move this Court to vacate or dissolve the stay of July 20, 1990 so that they may proceed with the prosecution of their state court suit. Claimants have also asked this Court to enter a stay as to all further proceedings in the instant action wherein Consol seeks exoneration from or limitation of liability, pending final resolution of the state court suit.

I. *Claimants' Motion to Vacate or Dissolve Injunction*

In *Langnes v. Green*, 282 U.S. 531, 51 S.Ct. 243, 75 L.Ed. 520 (1931) and in *Ex Parte Green*, 286 U.S. 437, 52 S.Ct. 602, 76 L.Ed. 1212 (1932), the Supreme Court announced that when a petition for exoneration from or limitation of liability was pending within the admiralty jurisdiction of a federal court, and where the only claim in the limitation proceeding was filed by a party who had previously filed a suit in a state court, then the federal district court should dissolve its stay or injunction as to the state court proceeding, but *only* if certain requirements were first met.

Appendix B

Subsequent to the *Green* decisions, various federal courts attempted to define precisely the factors which a claimant must first meet before the stay or injunction as to the state court proceeding could be lifted. The result of those decisions was the development of a rule requiring a claimant to file a series of stipulations when seeking to lift a stay. These stipulations were summarized by Professor Gilmore and Black in *The Law of Admiralty*, Second Edition (1975), at pages 871-872, as follows:

> The procedure which has been worked out under the *Green* cases is as follows: a single claim plaintiff who wishes to prosecute a common law action after the shipowner has filed a petition for limitation must
>
> a) file his claim limitation proceedings
>
> b) where a stipulation for value has been filed in lieu of the transfer of the ship to a trustee, concede the sufficiency in amount of the stipulation;
>
> c) consent to waive any claim of res judicata relevant to the issue of limited liability based on any judgment obtained in the state court;
>
> d) concede petitioner shipowners right to litigate all issues relating to limitation in the limitation proceeding.

(Citations omitted). *See also, Complaint of Businelle Towing Corp.*, 539 F.Supp. 609, 611 (M.D. La. 1982); *S & E Shipping Corp. v. Chesapeake and Ohio Railway Company*, 678 F.2d 636, 643 (6th Cir. 1982); *Newton v. Shipman*, 718 F.2d 959, 962 (9th Cir. 1983); *Jefferson Barracks Marine Service v. Casey*, 763 F.2d 1007, 1010 (8th Cir. 1985); *Valley Line Company v. Ryan*, 771 F.2d 366, 373 (8th Cir. 1985).

All of the courts which have addressed this issue are in uniform agreement that stipulations a), b), and d), above, are absolutely necessary before a stay of other proceedings may be lifted. Admittedly, however, there is a question as to the necessity of requirement b), that being that a claimant concede the sufficiency of the amount placed in the limitation fund. The split of authority with regard to this factor will be discussed more fully below, after Consol discusses whether the stipulations which have been made by Claimants herein at least satisfy the other three requirements.

Requirement (a) — File a Claim in the Limitation Proceeding

Consol concedes that Claimants have filed a formal claim in this action with respect to Consol's Complaint seeking exoneration from or limitation of liability, and therefore Claimants have met this requirement.

Requirement (c) — Consent to Waive any Claim of Res Judicata Relevant to the Issue of Limited Liability Based on any Judgment Obtained in the State Court

In paragraph 8 of their motion, Claimants and their counsel have agreed to "stipulate that no State Court judgment will be res judicata as to any limitation fact or issue in the limitation

proceeding." Although this stipulation may seem to satisfy the required res judicata waiver on first blush, Consol submits that a closer reading suggests that the stipulation, as worded, does not satisfy the requirement.

In the above regard, Claimant's stipulation only concedes that no state court judgment will be asserted as res judicata as to any "limitation fact or issue" in the limitation proceeding. However, the applicable decisions on this issue generally require that a claimant stipulate that "*no res judicata arguments* will be made based upon any state court judgment." *Complaint of Midland Enterprises, Inc.*, 886 F.2d 812, 814 (6th Cir. 1989) (emphasis added). *See also, In Re Red Star Barge Line, Inc.*, 160 F.2d 436, 438 (2d Cir. 1947) where the court required the claimant to waive any claim of res judicata relevant to the issue of limited liability and based on any judgment obtained in the state court action.

Consol is not uncertain as to what Claimants mean or intend when they limit their res judicata waiver to any "limitation fact or issue." While not intending to engage in semantical gymnastics, Consol nevertheless would suggest that Claimants' attempt to restrict their stipulation regarding res judicata only to "limitation facts or issues" is too narrow in the face of the decisional authorities which require a waiver of *any* claim of res judicata with respect to *any* issue relevant to the proceeding. Furthermore, Consol has sought both an exoneration from or a limitation of its liability in this action. To the extent Claimants' stipulation only applies to "limitation facts or issues", but not to issues relative to exoneration, then it does not properly protect this Court's admiralty jurisdiction over all issues in this proceeding.

Thus, to the extent that Claimants' stipulation is an attempt to waive res judicata, but only as to *certain* issues which may arise in this proceeding, then the stipulation is unduly narrow, and does not comport with the required language necessary to lift the stay as to Claimants' state court suit.

Requirement (d) — Concede Consol's Right to Litigate all Issues Relating to Limitation in the Limitation Proceeding

Claimants have stipulated in paragraph 8 of their motion that this Court "has sole and exclusive jurisdiction of any and all issues relating to Consol's attempt to limit its liability arising from Mr. Newman' a aforesaid injuries. Generally speaking, this stipulation would appear to satisfy the requirement necessary to protect this Court's admiralty jurisdiction to decide any and all issues in this proceeding. However, the stipulation does not specifically concede that Consol will have the continuing *right* to litigate any and all issues relative to this proceeding; but merely that this Court will have sole and exclusive jurisdiction over those issues. Additionally, the stipulation does not recognize that Consol seeks herein both an exoneration from or a limitation of its liability. If this Court were to formally and affirmatively interpret Claimants' stipulation as conceding that Consol will continue to have the *right*, following the lifting of the stay, to litigate any and all issues relative to exoneration or limitation solely and exclusively within this Court, then this particular requirement could be satisfied.

Requirement (b) — Concede the Sufficiency in Amount of the Stipulation

Commensurate with the filing of its Complaint herein, Consol filed an Affidavit of Value and a Limitation Bond securing the value of the M/V Elizabeth and Barge No. MC 1029

as an alternative to tendering the vessels themselves. The limitation fund as to those vessels has been offered at the combined aggregate value of $120,000.00. Part (b) of the generally quoted four part test set forth in Gilmore and Black, above, would therefore require Claimants herein to concede that the $120,000.00 value of the vessels in the limitation fund is sufficient and proper. Claimants have not made any such stipulation or concession in their motion.

Consol candidly admits, however, that various district and circuit courts are split in their determination of whether this concession is absolutely required before a stay of a state court action may be lifted. In that regard, certain courts addressing this issue have cited generally the four part test set forth in *Gilmore and Black* as being required in its entirety. *See e.g., S & E Shipping Corp. v. Chesapeake and Ohio Railway Company, supra; Jefferson Barracks Marine Service v. Casey, supra; Valley Line Company v. Ryan, supra; and In Re Red Star Barge Line, Inc., supra.* More specifically, in *Complaint of Tropigas Carriers, Inc.*, 603 F. Supp. 940 (S.D. Fla. 1985), the district court, when lifting its stay, specifically ordered the claimant to file a statement conceding the sufficiency and amount of the stipulation for value filed by the shipowner in the limitation action. Thus, a literal reading of the above decisions would indicate that Claimants' stipulation herein lacks the necessary concession regarding the sufficiency of the value of the limitation fund herein, and would therefore not support their request to lift the stay.

On the other hand, there are number of decisions which discuss in depth this particular requirement, and have rejected the reasoning that a claimant must stipulate to the value of the limitation fund before a stay may be lifted. *See, e.g, Complaint*

of Midland Enterprises, Inc., supra.; *In Re Mr. Wayne*, 729 F.Supp 1124 (E.D. La. 1989); *Kattelman v. Otis Engineering Corp.*, 701 F.Supp. 560 (E.D. La. 1988); *Complaint of North Lubec Manufacturing and Canning Company*, 647 F.Supp. 1132 (D. Me. 1986).

However, it is important to not that even in those decisions holding that a claimant need not stipulate to the value of the limitation fund, nevertheless, those courts have generally required that the other stipulations which the claimant did make include a concession, generally or specifically, that the valuation issue remained exclusively an admiralty question and was reserved for determination by the federal court in the limitation proceeding. *See, e.g., Complaint of Midland Enterprises, Inc., supra.* at 817, where the court accepted the claimant's contention that she need not stipulate to the value of the limitation fund itself, but must concede the exclusive right of the district court to determine value. *See also, Complaint of Businelle Towing Corp.*, 539 F.Supp 609, 612 (M.D. La. 1982) ("the determination of the amount of the fund to which [liability] will be limited are hereby specifically reserved to this Court"); *Complaint of Cannon*, 487 F.Supp 26, 28 (S.D. Fla. 1980) ("the value of the vessel can be finally determined when, and if, this Court is presented with the limitation of liability issue").

In the instant action, Claimants have not conceded the sufficiency of the value of the limitation fund offered by Consol. Therefore, if this Court accepts the reasoning of those decisions which require Claimant to specifically make such a concession before the stay will be lifted, then obviously Claimants herein have not complied with their requirement and the stay cannot be lifted.

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Alternatively, in the event this Court should, after review of the applicable authorities, favor the reasoning of those decisions which have not required a stipulation as to the value of the limitation fund before lifting the stay, then Claimants herein must nevertheless concede, in the stipulations which they do make, that the exclusive right to determine the sufficient and proper value of the limitations fund lies exclusively with this Court.[1] Claimants herein have not specifically conceded that any and all issues regarding the proper valuation of the limitation fund or of the the M/V Elizabeth and Barge No. MC 1029 are reserved exclusively for determination by this Court has sole and exclusive jurisdiction over any and all issues relating to Consol's attempt to limit its liability. If this Court were to formally and affirmatively construe that stipulation in broad fashion so as to include a concession by Claimants that all valuation issues are also reserved for exclusive determination by this Court, the proferred stipulation may be sufficient.

Response to Claimants' Third Stipulation

The third stipulation which Claimants and their counsel make in paragraph 8 of their motion is that they "stipulate that they will confine the Newmans' action to the case pending in the

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1. As this Honorable Court may recall, Claimants herein previously challenged the value of the limitation fund insofar as the number of vessels to be included was concerned. A hearing on Claimants' motion in that regard was held before this Court on December 21, 1990, after which Claimants' motion to increase the value of the fund by including the values of other barges in Consol's empty fleet was denied. However, it is to be noted that under Rule F(7) of the Supplemental Rules for Certain Admiralty and Maritime Claims, Claimants may still challenge the aggregate $120,000.00 value which has been placed on the M/V Elizabeth and Barge No. MC 1029, by requesting an appraisal of those two vessels.

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Court of Common Pleas of Allegheny County, Pennsylvania. Consol is currently not certain as to the exact meaning or intent of this particular stipulation, since, on its face, it does not appear to relate to any of the stipulations required by the authorities discussed above. However, if this stipulation is an offer by Claimants that they will not institute or pursue any other proceedings against Consol in any other court or forum, then the offer would be proper, since this Court's stay should only be lifted, if at all, to allow Claimants to pursue their previously filed state court suit, but not to allow for the filing of or processing of any other claims or actions.

On the other hand, in the event this stipulation is an attempt to suggest that Claimants are only agreeing to proceed with their state court suit, but are contesting whether they have any further obligation to continue to proceed in the instant exoneration or limitation of liability action, then Consol would suggest that this stipulation is an improper attempt to restrict or confine these proceedings. As the Court will note from a review of the various decisions discussed above, the lifting of this Court's stay against Claimants' state court suit does not in any manner act as a dismissal of the instant action or otherwise moot this action. This exoneration from or limitation of liability action will still remain viable and must eventually be resolved and decided.

Even if This Court Should Vacate or Dissolve its Stay, It Should Only do so in Limited Fashion

In the event this Court should decide, upon proper stipulation from Claimants, that the stay as to Claimants' state court suit should be vacated, dissolved or lifted, the blanket stay may not be lifted in ita entirety. In that regard, the stay Order of July 20, 1990 applies to any and all suits, actions or legal

proceedings against Consol or the involved vessels arising out of or connected with Mr. Newman's alleged accident of April 27, 1989. This Court's authority to lift its stay only extends to allowing a single claim Claimant to pursue a previously filed state court action involving the same incident. It does not, however, allow for the lifting of the stay in order to permit the filing or processing of any other claims by a claimant or any other person. Therefore, in the event this Court should decide to lift its stay herein, its Order should be crafted *only* for the limited purpose of allowing Claimants' state court suit to proceed.

Secondly, even as to the lifting of the stay to allow Claimants' state court suit to proceed, this Court should allow the stay to continue in effect against the entry of any judgment against Consol in Claimants' state court suit, and as to any consequent enforcement of any such judgment, pending the outcome of this proceeding for exoneration from or limitation of liability. *See, e.g., In Re Mr. Wayne, supra*, at 1130, where the court ordered the stay lifted to allow the prosecution of the claimant's state court action, but continued the stay in effect against entry of judgment and consequent enforcement of recovery pending the outcome of the limitation proceeding. *See also, Complaint of Dammers & Vanderheide*, 660 F.Supp. 153, 160 (S.D. N.Y. 1987), *aff'd*, 836 F.2d 750 (2d Cir. 1988). The reason for continuing the stay against the entry and enforcement of any judgment against Consol in the state court suit is to protect this Court's sole and exclusive admiralty jurisdiction over any and all issues relevant to exoneration from or limitation of liability.[2]

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2. This Court may allow the entry of a defense judgment against Claimants and in favor of Consol in the state court suit.

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II. *Claimant's Motion to Stay the Instant Proceeding*

As indicated above, Claimants have not only moved to lift the stay against their pending state court action, but have also moved this Court to stay the instant proceeding until after the termination of their state court suit.

Gilmore and Black suggest, at page 872, that where a federal court lifts its stay as to a state court suit, "the admiralty court dissolves or modifies its Section 185 injunction to allow the civil action to proceed, meanwhile holding the limitation proceeding in abeyance until the result of the civil action is known. Some district courts, when lifting their injunctions against state court actions, have temporarily closed their limitation of liability files, without prejudice, pending a request to re-open following the conclusion of the state court proceeding, or have otherwise held in abeyance any outstanding motions and pretrial matters pending resolution of the state court proceedings. *See, Kattelman v. Otis Engineering, Corp., supra*; *In Re Mr. Wayne, supra; Complaint of Tropigas Carriers, Inc., supra.*

Nevertheless, Consol is not aware of any authority which affirmatively *requires* this Court to stay the instant action if this Court should allow Claimants to proceed in state court. In that regard, it is to be noted that, in *Complaint of Cannon, supra*, at 29, the court lifted its injunction as to the state court proceeding and stayed its own limitation action. However, that court also ordered that, in the interim, the court "may take action on those matters that are not subject to determination by the state court."

Consol would respectfully submit that, ultimately, the decision as to whether to impose a stay on all further proceedings in the instant action rests solely within the discretion of this

Court. The general rule is that the pendency of an action in a state court is no bar to proceedings concerning the same or a similar matter in a federal court having jurisdiction. Nevertheless, many courts follow the rule that a federal district court has discretion to stay proceedings on its own docket pending the outcome of a similar suit instituted in a state court. The Supreme Court recognizes this discretion; however, has indicated that its exercise is justified only in exceptional circumstances. See, discussion at *Federal Procedure, L.Ed.*, Volume 1, Section 1:558. Factors affecting the decision to grant or deny a stay include, among others, the order in which jurisdiction was obtained, the similarities of the parties, the similarity of issues, avoidance of piecemeal litigation and the convenience of the forums. *See generally, Federal Procedure, supra,* at Sections 1:559-1:564.

It is to be noted herein that, while the parties are the same and the issues may appear to be similar on their face, the legal theories and burdens of proof are different in this action as opposed to those in Claimants' state court suit. It should also be noted that, although it is true that in the event Consol is ultimately successful in obtaining a defense verdict in the state court suit, no further action in this proceeding would be necessary; nevertheless, in the event of a jury award in favor of Claimants in state court, the parties would still return to this Court for a determination of whether Consol should be exonerated from and/or limited with respect to its liability. Under these circumstances, this Court may wish to continue with this proceeding presently, rather than waiting to proceed in the future.

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Respectfully submitted,

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Supreme Court, U.S.
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No. 95-1219

IN THE

Supreme Court of the United States

October Term, 1995

GEORGE NEWMAN,

Petitioner,

vs.

CONSOLIDATION COAL COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. IS THERE AN EXCEPTION TO THE "CLEAR AND INDISPUTABLE" REQUIREMENT WHEN MANDAMUS IS SOUGHT TO PROTECT A RIGHT TO JURY TRIAL?

II. IS A SEAMAN WHO PROPERLY DEMANDS A JURY TRIAL IN HIS JONES ACT CLAIM IN THE SHIPOWNER'S NONCONCURSUS ADMIRALTY ACTION TO LIMIT OR EXONERATE ITSELF FROM ITS LIABILITY ENTITLED TO A JURY TRIAL?

III. IS RESPONDENT'S RECITAL OF THE EXPRESS TERMS OF THE SEAMAN'S STIPULATION FALSE?

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SUPPLEMENTAL STATEMENT OF THE CASE

Mr. Newman has sought throughout this case only to preserve his rights to a jury trial, ideally by not having the facts found by the state court jury reexamined or, alternatively, if there is to be such a reexamination, that it be done by a jury as he demanded. Respondent's Brief in Opposition does not contend Mr. Newman failed to properly demand a jury trial. Newman told the district court:

> MR. HAMMER: Well, I think, Your Honor, to protect Mr. Newman's rights under the Seventh Amendment, that to decide this case, Mr. Newman is entitled to have those jury findings given weight by this Court.

(Appendix A53). He freely acknowledged he was not imposing the defense of res judicata.

> Mr. Hammer: No, Your Honor. We stipulated that we would not invoke res judicata.

(Appendix A52). Newman has *not* asked the lower court to preclude Consol from litigating its case on the basis of res judicata (*Id.*) and did not ask the Court of Appeals or this Court to bar it from litigating its claim to exoneration or limited liability based on that defense. (Page 29 Petition For Certiorari, Conclusion). Newman's references to the facts and the law of this case were and are required to demonstrate the materiality and importance of those facts in this proceeding.

Newman specifically invoked his constitutional right to a jury trial at all times. He demanded a jury trial from his first appearance in this case (Appendix A45) and the docket was so marked (Docket Entries, Appendix A12). That demand was never withdrawn and Consol has furnished no reference to the record indicating such withdrawal. Paragraph ten of Petitioner's Motion to the

lower court to Vacate and Dissolve the Injunction and to Stay specifically and expressly stated his constitutional right to a jury trial:

> 10. Mr. and Mrs. Newman, on the other hand, will be severely prejudiced if the Injunction remains in effect because they will be deprived of their right to prosecute this Case in State Court granted to them by Congress in the Savings to Suitors clause, 28 U.S.C.A. §1333 (Suitors in Admiralty are entitled to a common law remedy where the common law is competent to give it). *Mr. and Mrs. Newman will further be severely prejudiced if their Motion is not granted because they will be deprived of their right to a jury trial granted to them by the Constitution of the United States of America.*

(Paragraph 10, Appendix A48) (Emphasis added)

Mr. Newman stipulated only to three things: to waive res judicata, Consol has the right to litigate its issues and the valuation of the limitation fund is to be resolved by the district court (Appendix A50). That stipulation neither expressly nor impliedly waived Mr. Newman's right to jury trial. (*Id.*) The district court granted Mr. Newman's Motion to Vacate or Dissolve the Injunction and Stay and his included expressed right to jury trial in state court in its Order of February 1, 1991 (Appendix A10-11). The consequent jury verdict in Answers to Special Interrogatories is reproduced in Appendix A31-32 and was affirmed on appeal.

Consol has *not* argued to the district court, the Court of Appeals or this court, that the state trial and appellate courts unfairly prevented it from litigating the jury trial.

REASONS FOR GRANTING THE WRIT

I. This Case Seeking To Protect The Right To Trial By Jury Is An Exception To The "Clear And Indisputable" Requirement of Mandamus.

Consol's argument (Brief in Opposition, pp. 8-9) that mandamus is unavailable here does not discuss the exception to the "clear and indisputable" rule when the right to jury trial is at stake. (Petition For Certiorari, pp. 5-7). At least three circuit courts of appeals have held that the "clear and indisputable" requirement does not apply to mandamus actions involving the right to jury trial: *Wilmington Trust v. U.S. Dist. Court for D. Hawaii*, 934 F.2d 1026 (9th Cir. 1991), *cert. denied*, 503 U.S. 966 (1992) (admiralty case); *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648 (6th Cir. 1996) citing *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1303 (7th Cir. 1995) *cert. denied*, _____ U.S. _____, 116 S.Ct. 184 (1995) and *Beacon Theatres v. Westover*, 359 U.S. 500 (1959). The decision of the third circuit in this case to deny mandamus on that basis conflicts with the holdings of the sixth, seventh and ninth circuits and that in *Beacon Theatres*. Certiorari is necessary to resolve that very important conflict among the circuit courts of appeals and with *Beacon Theatres*.

Respondent argues that mandamus cannot overturn "previous authority of this court" (Brief in Opposition, p. 9), without citing any authority so holding. Consol buttresses that argument with the contention that the writ of mandamus was in the discretion of the Court of Appeals (*Id.*). That argument is foreclosed by the decisions of this court. See *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962) (Denial of mandamus to Defendant to obtain jury trial by third circuit reversed) and *Beacon Theatres, supra*.

II. The Jury, Not The District Court, Is The Lawful Finder Of The Facts Petitioner Seeks To Have Adopted.

The district court had independent concurrent jurisdiction of Newman's Jones Act case (Petition For Certiorari, p. 4) and the Seventh Amendment forbids the denial of his right to a jury trial merely because the court also had admiralty jurisdiction of the Limitation case. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines,* 369 U.S. 355 (1962). The Seventh Amendment also forbids any reexamination of the facts found by the jury. *Ellerman* at 369 U.S. 358-359. "Only one trier of fact should be used for the trial" of Jones Act claims in an admiralty case. *Fitzgerald v. United States Lines Co.,* 374 U.S. 16, 21 (1963). The courts are not "free, even if [they] wished, to require submission of all the claims to the judge alone." (*Id).* The right to jury trial extends equally to a defendant asserting legal claims in a plaintiff's nonjury action (Petition For Certiorari, p. 19).

Under Consol's analysis (Brief in Opposition, p. 24) the seaman is deprived of his rights to a jury trial both if he signs the stipulation or if he refuses to stipulate, because of the Limitation Act. Congress does not have the constitutional power to take away those rights in a proceeding before an Article III court. *Granfinanciera S.A. v. Nordberg,* 492 U.S. 33, 109 S.Ct. 2782, 2795-2796 (1989). The United States District Court for the Western District of Pennsylvania is an Article III court and Judge Bloch is an Article III judge. Congress has not created a non-Article III tribunal for limitation of liability cases.

III. Consol's Statement On Page 11 Of Its Brief In Opposition That "Petitioner Expressly Stipulated That The District Court Would Have Exclusive Jurisdiction For Determining All Issues Relating To Consolidation's Complaint For Exoneration From Or Limitation Of Liability And That *No* Fact Found By A Jury In The State Court Action Would Serve As *Res Judicata* In The Present Case. Pet. A50." Is False.

As Consol says, the stipulation is printed at page 50 of the Appendix to the Petition for Certiorari. Notably absent from that stipulation is any mention of "exclusive jurisdiction" and "no fact found by a jury in the state court action." The misrepresentation is shocking and unfair to the Court and Petitioner. The false statement is a tacit admission of the truth of Newman's argument that a litigant does not waive by implication his right to jury trial. (Petition For Certiorari, pp. 21-23). Consol has attempted here to manufacture evidence of a nonexistent express waiver contrary to the record because it recognizes Newman did not waive a jury trial but instead sought at every opportunity to preserve those rights.

Consol's argument, accepted by the district court, that exclusive jurisdiction over the limitation case justifies reexamination of the facts found by the jury is wrong because it ignores the statutory jurisdiction of the Jones Act claim. The exclusive jurisdiction argument has also been repeatedly rejected by this court: *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984) (Civil rights); *Marrese v. American Ac. of Orthopaedic Surg.*, 470 U.S. 373 (1985) (Anti-trust); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987) (Tort).

Understandably, Consol has cited no authority for the proposition that successful efforts to obtain a jury trial result in the oxymoron that the same efforts waive those rights.

CONCLUSION

The facts found by the jury that Newman seeks to have adopted as the foundation for this Limitation of Liability case are the result of the American constitutional, legislative and legal systems. The Seventh Amendment assures litigants that those facts will not be reexamined. The same Amendment and the Jones Act guaranteed Newman the right to a trial by jury, which has already been held. No statute or rule guaranteed Consol any right to a nonjury trial in the limitation case. Those facts should be adopted as the beginning facts in this Limitation of Liability case and Certiorari should be granted to reverse the denial of mandamus and remand with instructions to adopt the facts found by the jury and proceed with the litigation on those facts. In the alternative, although Newman believes he has a Seventh Amendment right not to have the facts reexamined, if there is to be such an examination, the writ should issue to compel that reexamination be done before a jury.

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